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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL., JACK ANDERSON, LILLIAN HELLMAN, ET AL.,
Intervenor-Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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This is an appeal from an order entered on January 7, 1976, by the United States District Court for the District of Columbia, denying the appellant's motions for preliminary and permanent injunctive relief and dismissing appellant's complaint which challenged the constitutionality of the Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note, 3315-24. This statement is respectfully submitted to show that this Court has

jurisdiction over the appeal and that the serious constitutional questions presented warrant plenary review.

OPINION BELOW

The opinion of the three-judge district court is not yet reported. It is reprinted herein as Appendix A, pp. 1a-106a, *infra*.

JURISDICTION

This action was instituted pursuant to Section 105(a) of the Presidential Recordings and Materials Preservation Act, and pursuant to 28 U.S.C. §§ 1331, 1332, and 1346. A three-judge court was impaneled pursuant to 28 U.S.C. §§ 2282 and 2284. The order of the three-judge court (App. B., pp. 107a-108a, *infra*) was entered on January 7, 1976. A notice of appeal to this Court was filed on March 4, 1976 (App. C., p. 109a, *infra*). The jurisdiction of this Court to review the decision of the three-judge court rests upon 28 U.S.C. § 1253.

STATUTE INVOLVED

Sections 101-106 of the Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note, 3315-24, are the subject of this appeal. The statute's text is reprinted in Appendix D, pp. 110a-116a, *infra*.

QUESTIONS PRESENTED

1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over

the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.

2. Whether the provisions of the Presidential Recordings and Materials Preservation Act which authorize immediate access and review by the government, and potential access by the public generally to the confidential deliberations of a President after he has left office, without any preliminary showing of particularized need and merely for historical purposes, violate the constitutional privilege of confidentiality.

3. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations.

4. Whether the First Amendment rights of appellant and his advisors in free speech and association are infringed by the governmental and potential public access to his materials granted by the Presidential Recordings and Materials Preservation Act.

5. Whether the Presidential Recordings and Materials Preservation Act constitutes a Bill of Attainder in violation of Article I, Section 9, Clause 3 of the Constitution in that it is a legislative enactment of "pains and penalties" aimed singly and specifically at the appellant.

6. Whether appellant has been denied equal protection of the laws, secured by the Due Process Clause of the Fifth Amendment, by a legislative enactment that "preserves" the "recordings and materials" of only his Presidency and subjects him to procedural and substantive obligations imposed upon no other President, past, present or future.

STATEMENT

Appellant served as President of the United States from January 20, 1969 to August 9, 1974. This case concerns the materials he and his personal staff accumulated in the White House during that period. Although it has been estimated that there are 42 million pages of documents within the scope of the Presidential Materials and Recordings Preservation Act, this case and the issues appellant raises principally concern that small percentage of material most intimately connected with appellant's personal and political activities while in office—including tape recordings of his conversations and some 200,000 other items personally prepared or reviewed by appellant. For the most part that material has always remained segregated from the bulk of the items seized by this Act and is presently stored in approximately four small areas in the White House complex. It is the seizure, review and potential publication of this material that present in clearest terms the issues raised by this appeal.

For the entire two centuries of this Nation's existence every President of the United States has had and has exercised sole and complete control over the disposition of the confidential materials accumulated by him and his staff while in office. On December 19,

1974, Congress departed from that unbroken tradition in order to deprive one particular former President of that right. It directed the General Services Administration ("GSA") to seize and review the entire record of Mr. Nixon's official, political and personal life from January 1969 through August, 1974. The enactment directed the GSA to make generally available all materials, including all recordings of confidential conversations, which might be deemed to constitute "Presidential historical materials." The constitutionality of that Act is presented for decision on this appeal.

A. History of Proceedings

In keeping with the practice of every prior President, appellant, upon leaving office, instructed his staff to arrange for the collection and transfer of his Presidential materials to California, where he anticipated they would be kept until the creation of a permanent repository established under the Presidential Libraries Act, 44 U.S.C. §§ 2101, 2107 *et seq.* The instructions given staff members concerning the assembly of these materials were the same as those given by William J. Hopkins, a career White House employee since the administration of Herbert Hoover, who directed the removal of President Kennedy's materials from the White House in the early days of the Johnson administration. As in the case of other mid-term transitions, staff members were to retain copies of any files needed for ongoing matters. The packaging and preparation of the materials proceeded in accordance with earlier tradition until halted because the Watergate Special Prosecutor stated that some of the materials "might be relevant" to pending investigations.

In order to clarify the matter of legal title to these materials, Counsel to President Ford requested an opinion from the Attorney General. A preliminary opinion, delivered by the Deputy Attorney General on August 29, 1974, and subsequently affirmed in a formal opinion by the Attorney General, advised the White House that appellant had title to these materials but that they were subject to judicial process.[1]

During the succeeding week, discussions were held between appellant's counsel and legal representatives of President Ford. As a result of these negotiations an agreement was concluded whereby appellant—confirming his long-standing intention to donate the majority of his Presidential materials, under appropriate access restrictions, to the United States for inclusion in a library—established an interim depository arrangement under which, for a period of three years (five years for recordings), no material could be removed and access could be gained only by joint action of appellant and the Administrator of General Services. The material was to be available at all times for production pursuant to lawful subpoenas or other compulsory process. A letter incorporating these terms was sent by appellant to the Administrator of GSA, who signed the agreement on September 7 after conferring with Counsel to the President.[2] When the government failed to implement the agreement, appellant instituted an action in the United States District Court for the District of Columbia seeking its

[1] The September 6, 1974 opinion of the Attorney General appears as Appendix E hereto, pp. 124a-133a, *infra*, 43 *Op. Att'y Gen.* 1.

[2] The agreement is reproduced as an appendix to *Nixon* v. *Sampson*, 389 F.Supp. 107, 160-162 (D.D.C. 1975), and is reproduced herein as Appendix F, pp. 134a-136a, *infra*.

specific performance. *Nixon* v. *Sampson*, D.D.C., C.A. No. 74-1518. Private plaintiffs thereafter instituted actions to set aside the agreement and to gain direct access to the materials, under, *inter alia*, the Freedom of Information Act. *Reporters Committee* v. *Sampson*, D.D.C., C.A. No. 74-1533; *Hellman* v. *Sampson*, D.D.C., C.A. No. 74-1551.[3]

On December 9, 1974, while various motions in the district court actions were pending, Congress enacted the legislation at issue here. It was signed by President Ford on December 19, and on the following day appellant filed this action, seeking declaratory and injunctive relief against enforcement of the Act on constitutional grounds, together with an application to convene a three-judge court pursuant to 28 U.S.C. §§ 2282, 2284. The district judge to whom the case was assigned failed to act on the three-judge court application, proceeding instead on an expedited basis with the consolidated cases to which he was assigned as a single judge, and in which the parties raised some of the same underlying issues presented in this case. A three-judge court finally was convened after action by the Court of Appeals on appellant's petition for a writ of mandamus. *Nixon* v. *Richey*, 513 F.2d 427, *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975).[4]

The three-judge court initially determined that it had jurisdiction under 28 U.S.C. § 2282 and granted

[3] These three actions have been referred to in this litigation as "the consolidated cases."

[4] The opinions of the Court of Appeals are reprinted as Appendices G and H, pp. 139a-202a *infra*. The judge to whom the case initially was assigned subsequently recused himself.

motions to intervene filed on behalf of the Watergate Special Prosecutor,[5] the Reporters Committee for Freedom of the Press, *et al.*, Lillian Hellman, *et al.*, and Jack Anderson (the latter three intervenors to proceed on a joint basis). The court deferred the motion for a preliminary injunction for consideration with the case on the merits,[6] and evidence was submitted by the parties consisting of affidavits, depositions, documentary exhibits and stipulations. The case was briefed and argued orally on September 24, 1975, and the court, in a 104-page opinion by Circuit Judge McGowan, denied the requested relief and dismissed the complaint on January 7, 1976. It also entered an injunction which bars, with certain exceptions, any access to the materials pending this appeal from its decision (pp. 107a-108a, *infra*).

B. Provisions of the Act

The Act provides, in Section 101, that "[n]otwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44 [the Presidential Libraries Act]," GSA shall "obtain, or retain, complete possession and control" of (1) all tape recordings involving Richard Nixon or any federal employee recorded in the White House or any other Presidential office from January 20, 1969, to

[5] The Special Prosecutor, declaring his interest in the Presidential materials to have been satisfied through procedures agreed upon between him and counsel for Mr. Nixon, subsequently moved for and was granted leave to withdraw as a party.

[6] All matters of custody and access to the Presidential materials were, during the pendency of this suit in the district court, controlled by orders entered in October and November, 1974, in the consolidated cases. The substance of these orders is described in the opinion of the district court (p. 16a, n. 10, *infra*).

August 9, 1974, and (2) "all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon . . ."[7] Section 102 of the Act bars destruction of any materials and directs that they be made available (1) for use in judicial proceedings, subject to any rights or privileges "which the Federal Government or any person may invoke," with requests by the Watergate Special Prosecution Force to have access priority over any other request; (2) to Richard Nixon, subject to regulations to be adopted by GSA;[8] and (3) to "[a]ny agency or department in the executive branch . . . for lawful Government use," subject to the same regulations.

The Act further provides, in Section 104, that the Administrator of General Services shall submit to Congress proposed regulations designed to "provide public access to the tape recordings and other materials referred to in section 101," taking into account seven "factors" including, first, "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate,'" and, last, "the need to give Richard M. Nixon, or his heirs, for his sole custody and use" those materials not likely to be related to Watergate *and* "not otherwise of general historical significance." These regulations may not be issued or changed at any time if

[7] The definition of "historical materials" is set forth in 44 U.S.C. § 2101, which covers every variety of paper or object having "historical or commemorative value."

[8] These regulations, adopted pursuant to Section 104 of the Act, are set forth at 41 C.F.R. §§ 105.63.101-.303.

the regulation or change is disapproved by a resolution of either House of Congress.[9]

Finally, the Act purports to give the United States District Court for the District of Columbia "exclusive jurisdiction" to entertain any challenge to the validity of the Act or any regulations issued thereunder and directs that, if any court should decide that the Act has deprived any individual of private property without just compensation, an amount adjudged by an appropriate court shall be paid from the Treasury (Section 105). Title II of the Act—not involved in this lawsuit—provides for the establishment of a commission to study matters relating to the control, disposition and preservation of the papers and effects of federal officials generally,[10] including the question "whether the historical practice regarding the records and documents produced by or on behalf of Presidents of the United States should be rejected or accepted . . ." (Section 3317).

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[9] To date the Administrator has submitted three different sets of proposed regulations to Congress. The Senate disapproved the first set by resolution dated September 10, 1975. The Administrator contends that he withdrew the second set following the district court's January 7 decision, but committees of both the House and Senate state that the Administrator had no power to withdraw the proposed regulations. S. Rep. No. 94-748, 94th Cong., 1st Sess. (1976). The Senate disapproved various of the second set of proposed regulations by resolution dated April 8, 1976 (S. Res. 428). On April 13, 1976, the Administrator submitted a third set. All three sets of proposed regulations contain provisions which preclude them from becoming effective until the final disposition of this case.

[10] The commission's report to Congress setting forth recommendations for legislation dealing with the materials of all federal officials was to be submitted by March 31, 1976. That deadline has been extended to March 31, 1977 and the "judicial member," previously to be a Justice of this Court, is now to be a federal judge appointed by the Chief Justice. Pub. Law 94-261.

C. The Materials At Issue

The materials seized and retained by GSA pursuant to the Act include, aside from the tape recordings of thousands of Presidential conversations, an estimated 200,000 documents or other items produced by Mr. Nixon or to which he gave his personal attention while President. The variety of this collection precludes a detailed description here, but the following samples are illustrative of their content:

1. Diary dictabelt recordings by appellant expressing his reflections, thoughts, ideas and concerns at the end of the day's activities;
2. Briefing books prepared for appellant by his staff in preparation for speaking appearances at political gatherings;
3. Preliminary drafts—many in appellant's own handwriting—and supporting materials for major addresses such as the State of the Union message.
4. Advice and recommendations to appellant from staff members and others regarding the possible veto of legislation;
5. Presidential diaries and appointment books; and
6. Memoranda of appellant's meetings throughout the country with political leaders and local officials.

In addition, the materials given personal attention by the former President which have been seized by GSA include items relating solely to Mr. Nixon's personal life: correspondence and notes from friends and family members, mementos of his inauguration and

travels, tapes of conversations with his wife, children, physician, attorneys, personal friends, and so forth.

Aside from these materials, which are at the heart of this case, the "Presidential historical materials" include voluminous documents which by unvarying tradition have been the outgoing President's to dispose of as he pleases, but which do not so directly implicate the constitutional principles at issue in this case. These materials—which, for the most part, are presently stored in facilities in Suitland, Maryland—consist largely of bulk mail, reports and papers of which copies are also found in the files of government departments and agencies, copies of task force studies, and volumes of GPO publications.

Not included among the Presidential materials at issue here are records of agencies and independent establishments within the Executive Office of the President, such as the National Security Council's institutional files, the files of the Central Intelligence Agency, and the papers of the Office of Emergency Preparedness and Council of Economic Advisers. Also not included are personnel and other records maintained by the Administrative Office of the White House, original copies of official Presidential actions such as vetos, messages to Congress or treaties signed by the President, and a "precedent file" consisting of copies of documents relating to certain Presidential actions determined by the White House Clerk to have precedential value for use in case similar actions are called for in the future. These documents have not traditionally been among those that Presidents have taken with them upon leaving office, and appellant claims no rights to them in this lawsuit.

D. The Decision of the Three-Judge Court

The district court held that the Act necessarily contemplates a process of government review and classification of all of appellant's Presidential materials and thus presents ripe constitutional issues (pp. 28a-31a, *infra*). Although the court upheld as a valid purpose of the Act the "historical preservation" of the materials for use by historians, journalists and other members of the public, the court declined to consider any claims it believed were dependent upon potential public access because it felt that regulations which the Administrator might adopt "could eliminate the basis for [such] objections" (pp. 26a-27a, *infra*).[11] In refusing to consider the effect of public access on the claims appellant presented, the court, nevertheless, approved four separate purposes of the Act which are served only by availability of the materials to the general public (pp. 58a-61a, *infra*).

After an extensive discussion of the argument that Congress had violated the principle of separation of powers by enacting sweeping legislation dealing with the documents maintained by a Chief Executive, the district court rejected the argument on the ground that it embodied an "archaic view" of "three airtight departments of government," and that no such "stiffly formal and mechanistic view of government" is constitutionally required (pp. 33a-35a, *infra*). The court also ruled that the doctrine of Presidential privilege—recognized by this Court in *United States* v. *Nixon*, 418 U.S. 683, 703-707 (1974)—is "less forceful" when the claim to preserve confidentiality is made by a Pres-

[11] For reasons stated below, we believe the district court erred in treating questions relating to public access as premature. See discussion pp. 21-22, *infra*.

ident after leaving office, and that only "minimal" intrusion is involved when "archivists" review a President's private deliberations (pp. 39a-46a, *infra*). The district court also found that the Presidential interests in confidentiality were outweighed by the public interest in control and disclosure (pp. 48a-61a, *infra*).

The court below found the invasion-of-privacy claim to be "the most troublesome challenge" in the case (p. 67a, *infra*). Despite appellant's claim of privacy rights in all the tape recordings and in many documents, the district court considered the privacy claim only in connection with materials not related to "the conduct of the presidency."[12] The court observed that among the items subject to the Act were "some papers and materials containing extremely private communications between [appellant] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files" (p. 71a, *infra*). Here, too, the contention that *public* access to such personal papers would violate constitutional rights was held to be "premature" (p. 68a, *infra*), but the court discussed, at length, the intrusion on appellant's privacy caused by the governmental screening which necessarily accom-

[12] The court at one point in its opinion observed that even as to the tape recordings, the proportion of conversations that "implicate plaintiff's privacy . . . appears to be quite small . . ." (p. 69a, *infra*). Apparently this conclusion rested on the assumption that most of the conversations "must surely relate primarily to the conduct of the presidency," and the further assumption that such conversations do not "implicate Mr. Nixon's privacy rights." (p. 71a, *infra*). It was and is Mr. Nixon's claim, however, that he had a reasonable expectation of privacy in *all* the tape recordings as well as certain of the documents, and that they are thus protected from governmental seizure and review by, *inter alia*, the Fourth Amendment. (See discussion pp. 22-25, *infra*.)

panies administration of the Act (pp. 69a-89a, *infra*). It concluded that, "on balance," the Act was a "reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives" (p. 87a, *infra*). In determining that the law was "reasonable" and, therefore, constitutionally permissible under the Fourth Amendment, the court analogized the Act to the electronic surveillance provisions of Title III of the Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, to civil administrative searches, and to procedures for dealing with "intermingled documents" at the prearraignment stage of a criminal proceeding (pp. 75a-83a, *infra*). It also relied on the assumption that review would be made by "discreet and professional government archivists" and on "the special circumstances before us in this case" (pp. 88a-89a, *infra*).

The district court also rejected appellant's First Amendment claims and the contention that he was singled out for a bill of pains and penalties. The court concluded that the law was not "punitive" in design and that it will not "in any significant way chill association by or with future presidents" (pp. 98a-103a, 91a-93a, *infra*). The court also concluded that appellant's materials were in a "unique status" and that this particular quality justified singling out the documents of his Presidency for distinctive treatment. It observed that because legislation regarding an *incumbent* President might "directly and adversely [affect] . . . executive policymaking" (p. 94a, *infra*), Congress was justified in dealing only with materials of one who was "in the intermediate status of having

terminated his service as President but not yet having established a presidential library" (p. 94a, *infra*).[13]

THE QUESTIONS ARE SUBSTANTIAL

This case raises issues of constitutional principle that are fundamental to our system of government and that call for authoritative consideration and resolution by this Court. All of the issues presented are matters of first impression, for this is the first occasion in two hundred years in which Congress has enacted legislation purporting to control the disposition and eventual publication of a President's most confidential thoughts, communications, and deliberations. The power of Congress so to influence the internal affairs of the White House transcends the parties to this particular action and the circumstances of this particular case. Whether the Constitution permits the exercise of such authority with respect to a coequal branch of government should be determined conclusively by the decision of this Court. That decision, moreover, will have a major impact upon further legislation governing the papers of other constitutional officeholders, legislation which—as reflected by Title II of the Act—is presently contemplated by Congress.

1. *Separation of Powers.* By seizing and authorizing review and potential disclosure of the materials of appellant's administration, Congress has launched an unprecedented invasion of the autonomy of the Executive Branch. It is difficult to conceive of a more

[13] In this regard, the court did not suggest what distinction was to be drawn as to the materials of other former Presidents that have not yet been donated to the United States for inclusion in their Presidential libraries.

intrusive form of control by one branch of government than dominance of the confidential, internal communications and files of a coequal branch. Would the Constitution permit the Congress to enact a "Judicial Materials Preservation Act" that would subject to "complete possession and control" of the government every memorandum and document kept by federal judges, including the Justices of this Court? Could Congress direct a federal officer to make such materials "available" to other federal agencies or to compose regulations, taking into account enumerated "factors," under which judges' memoranda or drafts of opinions would be made accessible to the public irrespective of the wishes of their authors?[14]

This Court stated in *Humphrey's Executor* v. *United States,* 295 U.S. 602, 629-630 (1935), that it was "hardly open to serious question" that the principle of separation of powers requires each of the three branches of the federal government to be "free from the control or coercive influence, direct or indirect, of either of the others." This, said the Court, was an "application of a principle that makes one master in his own house" and that "precludes him from imposing his control in the house of another who is master there." 295 U.S. at 629. See also *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1932).

The district court did not deal with these considerations but disposed of appellant's separation of powers argument by terming it "archaic" and prem-

[14] Justices have, of course, felt free to destroy their own papers to prevent public inquiry into the confidential deliberative processes of the Court. *E.g.*, Black, My Father: A Remembrance 250-255 (1975). And the inherent power of the Court to protect the confidentiality of its internal operations has been previously noted. *New York Times Co.* v. *United States,* 403 U.S. 713, 752, n.3 (1971) (Burger, C.J., dissenting).

ised upon "metaphysical abstractions," and by rejecting the doctrine of *Humphrey's Executor* and *O'Donoghue* as a "stiffly formal and mechanistic view of government" (pp. 33a-35a *infra*). Adopting what it chose to call "a more modern view," the district court held that the Act did not trench *unduly* upon the functions and prerogatives of a President.

The district court's action was improper for several reasons. First, the basic principle underlying *Humphrey's Executor* and *O'Donoghue*—that the Constitution restricts the measures that one branch can employ to interfere with or influence the internal operations of another—is as valid today as it was when those cases were decided, as this Court has recognized only recently. *United States* v. *Nixon,* 418 U.S. 683 (1974). Quite simply, if one is unable to vouchsafe to one's immediate subordinates that oral and written recommendations, proposals and comments will be kept confidential,[15] one is no longer "master in one's own house" in any sense of the term.

Second, if this Court's precedents are to be repudiated, it is this Court which should assume that responsibility, not the lower courts. And finally, even if the district court were correct in its assessment that the doctrine of separation of powers is to be

[15] This "very important interest in confidentiality of presidential communications," is, of course, subject to exception in particular cases if an overriding constitutional interest is demonstrated for disclosure of a particular communication, and if the conditions of the disclosure are minimally intrusive. *United States* v. *Nixon,* 418 U.S. 683 (1974). But the weight that this Court has assigned to the interest in confidentiality of Presidential communications and the limited circumstances under which the Court has approved disclosure of those communications gainsay the Congress' asserted right to seize, explore, and disclose every Presidential communication over a five-year period.

viewed differently today, that court erred in concluding that the seizure of confidential Presidential materials would not violate present separation-of-powers standards. We agree, of course, that the three branches of government are "partly interacting, not wholly disjointed" (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). Accordingly, Congress might, if it acted carefully and within narrow limits to implement overriding *constitutional* interests, compel specific disclosures of Executive Branch information. But in this case, Congress employed not a delicate scalpel, but a cleaver. It directed that control be exercised over *every* paper and recording of appellant's administration, and undertook to determine precisely how that control should be exercised. The practical effect of Congress' action is to make uncertain the confidential status of communications of current employees of the Executive and Judicial Branches. Whether they may remain confidential or be opened to public scrutiny appears to be at the choosing of the Legislative Branch. Neither the Executive nor the Judicial Branch may exercise similar powers with regard to internal memoranda or communications of the Legislature, and we believe the Constitution did not contemplate giving such unusual power to the Congress.

The line between the materials of incumbent and past Presidents—on which the court below relied so heavily—is more of a "metaphysical abstraction" than the practical, experience-based, separation-of-powers argument made by appellant. If Congress may, immediately upon termination of a President's tenure in office, impound his documents and other materials and prescribe the terms of their public

disclosure, the effect on the President and his advisors is the same as if their communications were currently open to public inspection. The inevitable posturing for sake of appearance, and the reluctance to advance unpopular or novel positions, will diminish the President's ability to make the informed decisions vital to his role under the Constitution.

2. *Presidential privilege.* Even were the Act more discriminating in scope or more careful in the procedures it prescribes, it would suffer from constitutional infirmity in its failure to accord sufficient weight to the "protection of the confidentiality of Presidential communications" which, as this Court recently recognized, has "constitutional underpinnings." *United States* v. *Nixon,* 418 U.S. 683, 705-706 (1974). The "presumptive privilege for Presidential communications" (418 U.S. 683, 708) may be overcome when what is sought is "disclosure of a limited number of conversations preliminarily shown to have some bearing on . . . pending criminal cases." 418 U.S. 683, 713. But the Act challenged here does not relate to a "limited number of conversations." Nor is there any requirement in the Act that the conversations or documents be disclosed only after a conversation has been "preliminarily shown to have some bearing" on a pending judicial proceeding. Moreover, the Act's provision purporting to reserve a person's right to "assert rights and privileges" to prevent disclosure has the practical effect of reversing the burden described by this Court for preserving Presidential confidentiality. 418 U.S. 683, 713-714.

The court below concluded that "mere screening by archivists, whose record for discretion in handling confidential material is unblemished" (p. 45a, *infra*)

entails little violation of Presidential confidentiality. Yet in *United States* v. *Nixon,* which involved disclosure to a grand jury, whose proceedings are secret, and to a prosecutor, equally sworn to secrecy (a protection not found in archival screening), this Court recognized that *any* possible breach of a President's assurance of confidentiality (even to a court *in camera*) can cause advisors to "temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process" and thus inhibit "candid, objective and even blunt or harsh opinions in Presidential decisionmaking." 418 U.S. 683, 705-708.

In this respect, the court below should not have treated as premature the impact on Presidential advisors of *possible* public access to confidential conversations and memoranda over a former President's objections. The precise content of the Administrator's regulations under the Act may make ultimate disclosure of a particular conversation more or less probable; but there is an unavoidable "chilling" effect on the b'untness of advice given by a Presidential advisor if he knows that the public *may* be given future access to his private views under regulations to be drafted by a government administrator, and approved by Congress, after the President has left office.

Nor is it realistic or meaningful to expect appellant or anyone else to protect their rights and privileges by litigating possible public disclosures on a piecemeal basis after the Administrator's regulations take effect. In *Buckley* v. *Valeo,* —— U.S. ——, 96 S.Ct. 612 (1976), this Court overruled similar lower-court conclusions that important constitutional issues were "unripe" for resolution. See *id.* at 666 n. 113 (Ques-

tion 7(a)); at 693 n. 177 (Questions 8(c), 8(d), 8(e)). Here the matters are ripe, for the countless decisions concerning public disclosures of appellant's thousands of conversations simply cannot be challenged and litigated individually.

3. *Invasion of Privacy.* The court below found the invasion-of-privacy claim "the most troublesome" (p. 67a, *infra*) and admitted that it did not "find it easy to dispose of" appellant's privacy challenge to the Act (p. 87a, *infra*). It rejected the challenge, nevertheless, by determining that the invasion was "reasonable" and that no warrant was required. This Court's decisions make it clear, however, that "reasonableness" is not the sole constitutional measure for statutory invasions of privacy. See *e.g., Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). These same decisions indicate that even where the warrant requirement is not applicable, the constitutional right to privacy is protected against infringement by a legislative directive. Moreover, in the principal analogy relied on by the court below—authorization for electronic surveillance under Title III of the Safe Streets Act of 1968—an invasion of privacy is permitted only upon a showing of probable cause of the commission of a crime demonstrated to the satisfaction of a neutral and detached magistrate. Additionally, the invasion must be carried out under statutorily imposed "precise and discriminate" standards, the absence of which led this Court to hold facially unconstitutional a New York wiretapping law. *Berger* v. *New York* 388 U.S. 41 (1967). The lower court recognized that this Act was deficient in that respect and that "the parallel is not, of course, perfect," but the court felt that future regulations could remedy the problem (pp. 81a-82a, *infra*).

We know of no law ever enacted by Congress authorizing government seizure of all the papers and effects of a man's life covering a five-and-one-half year period. Like every President before him, appellant's entire personal, political and official life is embodied in the materials accumulated during his Presidency. And under the Act, as the lower court recognized, there will be an unavoidable "comprehensive screening" by at least three levels of government employees (and possibly non-government appointees) of this intensely private material. (p. 71a, *infra*).

To minimize the significance of this invasion, the court asserted that because the recorded conversations occurred in appellant's office (as opposed to his home), the "ratio" of personal conversations to those concerning his political and official activities "appears to be quite small" (p. 69a, *infra*).[16] This limitation of privacy protection to appellant's *personal* discussions is contrary to this Court's statement that "[t]he expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens . . . ." *United States* v. *Nixon,* 418 U.S. 683, 708. The Court was speaking there not of family or personal discussions, but of a President's communications with his staff concerning all matters.

Moreover, there can be no doubt that appellant had a "reasonable expectation of privacy" in *all* his records of Presidential conversations. The prerogative of

[16] This conclusion contrasts markedly with the court's statement in its Presidential privilege discussion that "significant portions of the tape recordings, are not related to the discharge of presidential duties and hence fall outside the scope of [the privilege's] protection" (p. 41a, *infra*).

preserving confidentiality had been exercised by every other former President, had been implicitly recognized by the only two courts ever to address questions concerning Presidential papers,[17] and had been accepted by Congress, as illustrated by the legislative history of the Presidential Libraries Act of 1955[18] and the joint resolution authorizing acceptance of the Franklin D. Roosevelt Memorial Library in 1939.[19] Accordingly, the lower court erred in suggesting that government review of all of appellant's recorded conversations while President would be only a minimal intrusion upon his privacy.[20]

Finally, a major factor relied upon by the lower court to sustain the "reasonableness" of the privacy invasion was that the search would be carried out by "professional and discreet" government archivists. But the constitutionality of an admitted invasion of privacy has never been justified by the professionalism or discretion of the government employees who will conduct

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[17] *Folsum* v. *Marsh*, 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 1841); *In re Roosevelt's Will*, 73 N.Y.S. 2d 821 (Surr. Ct. 1947).

[18] Hearing on H.J.Res. 330, 331, 332, Before the Special Subcommittee of the Committee on Government Operations, 84th Cong., 1st Sess. at 14, 28, 58-59 (June 13, 1955).

[19] 84 Cong. Rec. 6628, 9046 (1939).

[20] Contrary to the lower court's suggestion, appellant never intended the recordings of his conversations or his diary to be reviewed by anyone other than himself or his family. When he left office, he instructed that all of the materials be sent to him in California. However, even after the Attorney General concluded that appellant owned the material, the government refused to release it because the Special Prosecutor insisted that his staff first be able to search the tapes and documents.

the search. The intrusion on the sanctity of a man's life by government personnel is itself what the Constitution forbids. That the government intruders may refrain from exposing to the public the personal information they find does not make the privacy invasion "reasonable." Moreover, in casting the government archivists in the role of neutral and detached magistrates, the district court ignored the fact that the very determination committed to the archivists under the Act—whether material is of historical significance so as ultimately to be made available to the public or whether it should be returned to appellant as purely personal *and* without historical value—is a determination as to which archivists are not likely to be neutral. Their professional commitment to public access for historical purposes is evidenced by the strong representation of government archivist personnel among the membership of the various associations that are contesting appellant's claims in this case.

4. *Free Speech and Association.* The district court found that Mr. Nixon "appears to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening [of his Presidential materials] took place" (p. 91a, *infra*), but again belittled the significance of the matter by assuming that only a very few items "truly implicate" Mr. Nixon's First Amendment claim (p. 90a, *infra*). The court's assumption about the nature of the Presidential materials ignores the observation by Dr. Herman Kahn of Yale—the person in this country who, until his death a year ago, was most familiar with Presidential papers—that with any President, "at least 50 percent, probably more, of what we call the President's papers are

political rather than governmental in character." Dr. Kahn went on the explain:[21]

> "I use the word political here not in any derogatory sense but in its truest and highest sense, as meaning public leadership, the successful functioning of party activities, and the marshalling of public and political support for the President's policies, programs, views, and the issues that he lays before the public. These are not records of governmental action. They are ancillary to and related to Government as all politics is related to Government, but they are not governmental records in the sense that they are records created by the President in the course of carrying out acts of Congress or otherwise acting in his formal constitutional capacity as Chief Executive or Commander in Chief. Because of the nature of his office, political matters inevitably are diffused through a very large part of what we call the papers of the President."

The principle established by the district court's upholding of this Act is that Congress, for the sake of preserving the historical record and informing Congress and the public about "abuses of power," may summarily seize all records of the political activities and communications of a President or any other constitutional officeholder, have them reviewed and classified by government personnel, and place upon the individual the burden of contesting, as to each and every document or recording, whether it shall be made public. This Court has very recently reaffirmed the principle that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed

[21] Hearings Before the Subcommittee on Printing, Committee on House Administration, 93d Cong., 2d Sess. at 93-94.

by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley* v. *Valeo,* —— U.S. ——, 96 S.Ct. 612, 656 (1976). The governmental interests advanced to support the encroachment "must survive exacting scrutiny." *Id.* Whether the purported interests relied upon by the district court in this case to justify the blanket seizure and governmental review of the entire record of one President's political activities during his term in office is a question that demands full consideration by this Court.

5. *Bill of pains and penalties and denial of equal protection.* The legislative history of this Act confirms, we submit, what may fairly be inferred from its plain language—that it was devised to impose unique disabilities on a single individual as the culmination of an extraordinary series of events in our Nation's history. If Congress believed that all Presidential materials warrant the kind of control and screening that has been established by this law for appellant's papers, it could have enacted a statute dealing generally with the subject of Presidential documents. Instead, it covered only the period between January 20, 1969, and August 9, 1974, and the Act names the appellant specifically. This kind of legislation violates the constitutional rule set out by this Court in *United States* v. *Brown,* 381 U.S. 437, 450 (1965), which permits Congress to enact only "a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics" is subject to the statute but prohibits Congress from "designat[ing] . . . the persons who possess the feared characteristics." This Act is not one of the "gen-

eral rules for the government of society"; it is "the application of those rules to individuals in society"—and therefore not a proper subject for legislation. See *Fletcher* v. *Peck,* 6 Cranch 87, 136 (1809).

For similar reasons, the Act denies appellant the equal protection of the laws to which he is constitutionally entitled. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954). Whatever legitimate legislative interests might be said to justify seizure of *all* of a President's papers and effects apply equally to the materials of the current President and to the materials of those who preceded appellant in office. The legislative decision to single out appellant by name violates the long-standing rule that a legislative classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920); *Reed* v. *Reed,* 404 U.S. 71, 75-76 (1971); *Eisenstadt* v. *Baird,* 405 U.S. 438, 446-447 (1972).

CONCLUSION

At issue in this litigation is the validity of Congress' attempt to take from a President, for the first time in this Nation's history, the authority to determine whether and when the documents and other materials of his administration shall be disclosed. The reasons given by the court below for rejecting appellant's challenges to the law are unsound and the constitutional issues presented are of extraordinary importance. Probable jurisdiction should be noted and the case set for oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States District Court

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-1852

RICHARD M. NIXON, PLAINTIFF

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,
DEFENDANTS

and

THE REPORTERS COMMITTEE FOR FREEDOM
OF THE PRESS, *et al.*,
JACK ANDERSON, LILLIAN HELLMAN, *et al.*,
INTERVENOR-DEFENDANTS

January 7, 1976

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Before McGOWAN and TAMM, *Circuit Judges*, and ROBINSON, *District Judge*.

Summary

In this action, plaintiff Richard M. Nixon has challenged the constitutionality of Title I of the Presidential Recordings and Materials Preservation Act. The Act directs the Administrator of General Services to take custody of Mr. Nixon's presidential papers and tape recordings, and to promulgate regulations that would provide for the orderly processing of such materials for the purpose of returning to Mr. Nixon such of them as are personal and private in nature, and of determining the terms and conditions upon which public access may eventually be had to those remaining in the Government's possession. In designing such regulations, the Administrator must consider the need to protect the constitutional rights of plaintiff and other individuals against infringement by the processing itself or, ultimately, by public access to the materials retained. Title II of the Act establishes a Commission to study the final disposition of the records of federal officials generally, and to report its recommendations to Congress. The court concludes that there is no constitutional infirmity in the Act on its face requiring its enforcement to be enjoined.

Scope of Inquiry

The court, responding to its duty to avoid constitutional questions whenever possible, considers only those questions of the Act's constitutional validity that are immediately ripe for resolution. As no regulations have yet taken effect, and as such regulations once effective are explicitly made subject to judicial review, the court considers only the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and

their screening by government archivists. Slip op. at 18-31 *infra*.

Claims Relating to the Separation of Powers

The court finds nothing in the separation of powers doctrine to support the contention that the legislature may not pass a statute in any way touching upon the prerogatives of the Executive. The only genuine separation of powers claim is that the Act might invade the presidential privilege that attaches to the small fraction of the materials that genuinely implicate presidential confidentiality. Although the court thinks it doubtful that a former President, rather than the incumbent, may assert such privilege, at the very least such a claim is entitled to relatively less weight in the balance of competing considerations. And the infringement upon presidential confidentiality caused by screening by trained and discreet government archivists, who have been employed to perform identical tasks for the materials of every President since Herbert Hoover, is very slight. The court finds, on the other hand, that Congress had ample reason to mandate screening by government archivists rather than control by Mr. Nixon, who lacks their expertise and disinterestedness. The two most important of the interests served by preservation and responsible treatment of presidential materials are (1) maintaining a complete and accurate historical record and (2) assuring the availability of the materials potentially needed for continuity in executive policymaking. Other interests served by the Act include informing the public about the Watergate matters and ensuring the availability of materials that may be relevant to legislative investigations or judicial proceedings. Because of the manner in which personal materials are intermingled with official ones, comprehensive screening represents the only feasible

manner of protecting these important interests. The court finds that the slight inroad on presidential confidentiality caused by such screening is outweighed by the need to further these important legislative objectives. Slip op. at 31-66 *infra*.

Claims Relating to Privacy

It appears from the record that plaintiff can validly claim a privacy interest in only a small fraction of the materials. Yet due to the historical practice of *de facto* control by Presidents of presidential materials, the court finds that regardless of where ownership of the materials lies—a question that need not be reached—plaintiff has a reasonable expectation of privacy in these materials, an interest that is infringed even by mere screening by government archivists conducted under legislation with retroactive application. In light of the intermingled nature of the materials, the court finds such infringement of privacy interests to be an inescapable concomitant of any attempt to serve the important legislative objectives underlying the Act. The private materials are far outnumbered by those that are non-private and related to those objectives. The court further finds that any invasion of privacy caused merely by archival processing—rather than by public access, which need not yet be considered—is not wide-ranging. In addition, less justification is needed when, as may be the case here, any invasion of privacy constituting a search and seizure does not serve law enforcement objectives. In light of these factors and the unavailability of less intrusive means of furthering the important legislative ends, the court concludes that any intrusion upon plaintiff's privacy interests has adequate justification. Slip op. at 67-89 *infra*.

Freedom of Speech and Association

Plaintiff's First Amendment claim is predicated upon the assumption that all materials—including those impli-

cating privacy in political association—will be open to public access. The court finds no basis for that assumption. Rather, reaching only that infringement of First Amendment interests caused by screening by government archivists, the court finds any injury to protected interests arising from a confidential review process to be insubstantial. Slip op. at 89-93 *infra*.

Equal Protection

The court finds that any difference in treatment between plaintiff and other Presidents is adequately justified. As respects immediate past Presidents, their papers had already been deposited in presidential libraries where, on the whole, their availability to promote important governmental interests was assured. As respects current and future Presidents, legislating with respect to them risked disrupting current executive policymaking, and would be unwise before the Commission study of the sensitive and complex problems involved in regulating the records of federal officials had been completed. Only plaintiff has finished his service as President but has not yet established a presidential library. Prompt congressional action was reasonably deemed necessary to assure that the materials would remain preserved, and to begin the lengthy process of reviewing and classifying them. Finally, Congress could legitimately consider plaintiff to be less likely than his immediate predecessors or successors to dispose of the materials responsibly. Slip op. at 93-97 *infra*.

Bill of Pains and Penalties

There is, in the court's view, no evidence in the legislative record to support the claim that the Act was designed to impose, or constitutes, punishment within the meaning of the Bill of Attainder Clause. The court finds there are other legislative objectives served by the Act

which Congress could legitimately—and did—consider. Rather than possessing traditional indicia of a punitive enactment, the Act includes provisions that indicate a concern for plaintiff's interests, provisions that are wholly inconsistent with the hypothesis of punitive intent. Slip op. at 97-103 *infra*.

OPINION

MCGOWAN, *Circuit Judge*: On December 20, 1974, plaintiff filed this suit, alleging that the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526 (Dec. 19, 1974), 88 Stat. 1695, 44 U.S.C.A. §§ 2107 note, 3315-24 (Supp. I, Feb. 1975), [hereinafter "the Act"] is unconstitutional and seeking injunctive and declaratory relief. Jurisdiction was premised on section 105(a) of the Act, which grants the United States District Court for the District of Columbia exclusive jurisdiction to hear challenges to the constitutional validity of the Act. A three-judge district court was, on plaintiff's motion, eventually convened pursuant to 28 U.S.C. §§ 2282, 2284 (1970), as the action sought on constitutional grounds to enjoin the enforcement of a federal statute. Plaintiff alleges that the Act infringes the powers of the President; invades his presidential privilege; infringes his constitutional rights of privacy, free speech, and free association; is an unconstitutional search and seizure; denies him equal protection of the laws; and is an unconstitutional bill of pains and penalties. For the reasons appearing below, we hold that there is no constitutional defect apparent from the face of the Act requiring us to enjoin its operation.

I. BACKGROUND

Plaintiff was, of course, the President of the United States from January 20, 1969 to August 9, 1974. He resigned on the latter date, less than two weeks after the House Judiciary Committee had voted to recommend his

impeachment. H. R. REP. No. 93-1305, 93d Cong., 2d Sess., at 10-11 (1974). When he left office, Mr. Nixon had no intention of permanently leaving the materials accumulated during his administration[1] in the White House,

[1] To understand what materials are at issue in this case it is important to understand the filing system employed in the White House. The basic filing unit is the Central Files, in which copies of a wide variety of records are maintained according to subject. Included therein are incoming and outgoing correspondence of the President and his staff, reports, memoranda, and various other documents. Members of the White House staff are supposed to send virtually all papers (or copies thereof) relating to their official functions to this filing unit, which serves as the basic reference system for presidential papers. *See* Affidavit of William F. Matthews at 1-2, exhs. A, B, E [hereinafter "Matthews Affidavit"].

A few sections of the Executive Office of the President (a so-called umbrella agency)—for example, the Domestic Council and the Council on International Economic Policy—interfile papers with the Central Files. *Id.* at 2; Deposition of Jack Nesbitt in *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975), at 15 [hereinafter "Nesbitt Deposition"]. On the whole, however, component parts of the Executive Office—including the Office of Management and Budget, the Office of Telecommunications Policy, the Council of Economic Advisors, and the Council on Environmental Quality—maintain separate files. Nesbitt Deposition at 15, 19; Matthews Affidavit at 2; Affidavit of William J. Hopkins at 2 [hereinafter "Hopkins Affidavit"]. The National Security Council maintains a set of institutional files relating to the internal decisionmaking and policymaking processes of the Council. It also maintains "non-institutional" files, which include

> records of negotiations with foreign governments, correspondence with foreign heads of state and government, correspondence—including presidential directives—with agencies in the Executive Branch on matters concerning foreign affairs but not considered part of the NSC institutional process . . . .

Affidavit of Jeanne W. Davis at 3. Included within the Central Files, however, are materials sent from departments or agencies of the Executive Branch—including the Executive

Affidavit of Richard Nixon at 2 [hereinafter "Nixon Affidavit"], and immediately after his resignation government archivists began to collect these materials and box

Office of the President—to the President or his staff. Matthews Affidavit at 2.

During the last three years of Mr. Nixon's presidency, a subsection of the Central Files, known as the Special Files, was established for various kinds of sensitive material. Affidavit of Gertrude Fry at 1-3. This was an innovation and the practice has since been discontinued. *Id.* Another subsection of the Central Files, of less recent origin and continuing use, is the Precedent File. This file collects on a less than systematic basis materials dealing with unusual subjects that might provide useful precedents were similar situations to arise—for example, materials relating to how the configuration of the American flag was changed when Hawaii and Alaska were admitted to the Union. Matthews Affidavit at 2; Hopkins Affidavit at 6-7.

Outside of the Central Files, there are three other principal places where records are kept. First, the Records Office in the White House maintains a Card File which records only the fact that certain actions were taken by the White House. For example, were a President to veto a bill, the fact that such action was taken would be recorded in the Central Files; the official document transmitting the veto would be sent to Congress; and any underlying material relating to the formulation of the veto decision and message would be sent to the Central Files. Hopkins Affidavit at 5. Second, the Administrative Office of the White House maintains files relating to personnel, purchases, and accounts. *Id.* at 6. Third, each staff member may retain individual files relating to his own activity, and the President may maintain a personal file; but, as noted above, the originals or copies of materials in staff files are supposed to be sent to the Central Files.

Plaintiff claims the right to dispose of the tape recordings made during the Nixon presidency and all the materials for the same period described above, except: (1) the Card File in the Records Office; (2) the Precedent File of the Central Files; (3) the separate files of component parts of the Executive Office of the President (including the National Security Council institutional files); (4) the files of the Administrative

them for shipment to California. Deposition of Jack Nesbitt in *Nixon v. Sampson*, 389 F. Supp. 107 (D.D.C. 1975), at 38-43.[2]

Shipment was halted by the new administration after the Watergate Special Prosecutor informed the White House of his continuing need for the materials. Deposition of Benton L. Becker in *Nixon v. Sampson, supra*, at 6-11 [hereinafter "Becker Deposition"]; Affidavit of Peter M. Kreindler in Support of Motion of Leon Jaworski, Special Prosecutor, to Intervene in *Nixon v. Sampson, supra*, Oct. 21, 1974, at 2-3; Deposition of Philip W. Buchen in *Nixon v. Sampson, supra*, Vol. I, at 4-7, Vol. II, at 10-11, 73-74 [hereinafter "Buchen Deposition"]. While the materials remained at the White House, Philip W. Buchen, Counsel to President Ford, solicited and received from the Justice Department a preliminary opinion that the materials were plaintiff's private property. Buchen Deposition Vol. I, at 7, 11-12.[3] At or around the same time, negotiations about them between the White House and Mr. Nixon's attorney commenced. Buchen Deposition Vol. I, at 14-15, Vol. 2, at 36-48, exhs. 4, 5; Becker Deposition at 28-29, 35. These negotiations culminated in an agreement whose terms

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Office; and (5) materials in the files of individual staff members of which there is no duplicate in the Central Files and which were not gathered by archivists who, shortly after Mr. Nixon's resignation, attempted to accumulate from staff members all non-personal materials, *see* p. 63 *infra*. Plaintiff's Brief at 9-24.

[2] Although no evidentiary hearing was held by this court, various depositions, testimony, affidavits, and other evidentiary materials are in the record on the basis of stipulations by the parties.

[3] This opinion was subsequently confirmed officially by the Attorney General. *See* 43 OP. ATT'Y GEN. No. 1 (Sept. 6, 1974).

were elaborated in a letter from plaintiff to Arthur F. Sampson, Administrator, General Services Administration (GSA), dated September 6, 1974 and which was accepted by Sampson the next day. Deposition of Arthur F. Sampson in *Nixon v. Sampson, supra*, exh. 1; Buchen Deposition Vol. 2, at 36-48; Becker Deposition at 50-51, 103.

In its most important features, the Nixon-Sampson agreement provides that all "presidential historical materials" [4] accumulated during the Nixon presidency were to be placed under deposit pursuant to the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.* (1970), and transferred to the Administrator of GSA, under whose custody they would be shipped at Government expense to a Government facility in California near Mr. Nixon's residence. For a period of three years or, in the case of tape recordings, five years, access to the materials would be limited to Mr. Nixon or persons authorized by him, although access required two keys, one in Mr. Nixon's and one in GSA's possession. No original materials could be withdrawn during this initial stage, but Mr. Nixon could reproduce any document and, with the agreement of GSA, any tape recording. If any materials under deposit were sought by legal process, Mr. Nixon was to receive immediate notification to enable him to assert any rights or privileges he might have, and he agreed to afford the United States the same opportunity. After the three-year period had expired, Mr. Nixon could withdraw from deposit any documentary materials he wished and dispose of them as he saw fit. As of September 1, 1979, Mr. Nixon made a gift to the United States of the tape recordings, subject to the conditions that he could direct destruction of such tapes as he wished and that all of them were to be destroyed

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[4] *See* note 6 *infra*.

if Mr. Nixon died and in any event not later than September 1, 1984.[5]

After implementation of this agreement had been delayed at the instance of the Special Prosecutor and negotiations between the Special Prosecutor and plaintiff's attorney reached an impasse, plaintiff filed suit in the district court. *Nixon v. Sampson, supra.* That action, brought on October 17, 1974, named Sampson, Buchen, and H. Stuart Knight, Director of the Secret Service, as defendants, and sought to enforce compliance with the terms of the Nixon-Sampson agreement. Shortly thereafter, two groups of plaintiffs (both of which are intervenor-defendants in the case at bar) brought suit seeking to have the materials declared the property of the United States Government, to enjoin their transfer to Mr. Nixon, and to gain access to them under the Freedom of Information Act, 5 U.S.C. § 552 (1970). In one such action, *Hellman v. Sampson,* Civil No. 74-1551 (D.D.C., filed Oct. 24, 1974), Mr. Nixon was named as a defendant along with government officials; in the other, *Reporters Committee for Freedom of the Press v. Sampson,* Civil No. 74-1533 (D.D.C., filed Oct. 21, 1974), he was subsequently permitted to intervene, *Nixon v. Sampson, supra,* at 118. Ultimately, these two actions were consolidated with the suit brought by Mr. Nixon, and both the Special Prosecutor and Jack Anderson, a newspaper columnist, were permitted to intervene in Mr. Nixon's suit, the former as a defendant and the latter as a plaintiff. *See id.* at 114, 117-18.

Before that litigation had been filed, Congress had commenced consideration of legislation dealing with the

[5] The agreement is reprinted as an appendix to both the Senate and House of Representatives committee reports. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess. (1974); H. R. REP. No. 93-1507, 93d Cong., 2d Sess. (1974).

disposition of presidential papers. After enactment by Congress, the Act was signed into law by President Ford on December 19, 1974. The Act, which supersedes the Nixon-Sampson agreement, directs GSA to obtain possession of (1) all tape recordings of conversations recorded by any federal official which involve Mr. Nixon or any other employee of the Federal Government and were recorded, during the time Mr. Nixon was President, in the White House or other offices used by Mr. Nixon (section 101(a)); and (2) all "Presidential historical materials" for the same period (section 101(b)).[6] All items in the custody of GSA are to be available to legal process, subject to any rights, defenses or privileges invoked by the Government or any individual (section 102(b)); to Mr. Nixon or his designee (section 102(c));[7] and to any agency or department of the Federal Government for lawful Government use (section 102(d)).[8]

[6] Section 101(b)(2) incorporates by reference the definition of "historical materials" given in 44 U.S.C. § 2101 (1970), which reads in relevant part:

> "historical materials" including [sic] books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value.

[7] Although neither the Act nor the regulations promulgated pursuant to § 103 of the Act, *see* note 8 *infra,* explicitly grant Mr. Nixon the right to reproduce any materials, § 102(c) provides that he shall have access "for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103." All counsel at the oral argument on the merits appeared to agree that plaintiff would be able to reproduce the materials retained in government custody.

[8] Section 103 of the Act merely directs the Administrator to issue regulations to assure preservation of the materials in

Under section 104(a) of the Act, the Administrator is directed to promulgate regulations governing public access to the materials covered by section 101, taking into account the following seven factors:

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

The regulations must be submitted to Congress, either House of which has ninety legislative days to disapprove them before they take effect (section 104(b)(1))—a power the Senate exercised with respect to the initial set of

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custody and to prevent unauthorized access to them. Such regulations have been promulgated. *See* 40 Fed. Reg. 2669 (1975), *to be codified as* 41 C.F.R. §§ 105.63.101-.303.

regulations drafted by GSA. 121 CONG. REC. S 15803-08 (daily ed. Sept. 11, 1975). Thereafter, on October 15, 1975, GSA submitted a revised set of regulations to Congress. As of this date, however, no regulations have yet taken effect.

Section 105 of the Act grants exclusive jurisdiction to the District Court to hear a variety of actions involving the Act, regulations promulgated thereunder, or materials covered by section 101 (subsection 105(a));[9] contains a standard separability clause (subsection 105(b)); and authorizes payment of funds to any individual who is found to have been deprived by the Act of private property without compensation (subsection 105(c)).

Title II of the Act establishes a National Study Commission on Records and Documents of Federal Officials, composed of members of Congress, the Executive, the Judiciary, and private citizens from the archival and learned professions. 44 U.S.C.A. § 3318 (Supp. I, Feb. 1975). The Commission's mandate is to study problems and questions relating to the disposition and preservation of records and documents produced by federal officials, with a view toward appropriate legislative recommendations. *Id.* § 3317. Although the Commission's report to

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[9] Section 105(a) provides:

> The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

the President and Congress is to be submitted by March 31, 1976, *id.* § 3322, as of December 10, 1975, not all of the members had yet been appointed, and the first meeting was not scheduled until December 15, 1975.

On December 20, 1974—one day after the Act was passed—Mr. Nixon filed a second action, the one now before us, against the Administrator of GSA and the United States, challenging the constitutionality of the Act, together with a request for convention of a three-judge court, which request, after some delay, was ultimately granted. *See Nixon v. Richey*, 513 F.2d 427 (D.C. Cir. 1975) (per curiam), *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975) (per curiam).[10] This court, by an order dated May 1, 1975,

[10] Nixon v. Richey, *supra*, also stayed further proceedings in the consolidated cases—in which an opinion has been issued, *see* Nixon v. Sampson, *supra*, but no judgment entered—in order to permit this action to proceed with priority in accordance with the mandate of § 105(a) of the Act, *see* note 9 *supra*. The Court of Appeals' opinion indicates the reasons that favor according priority to this action. 513 F.2d at 437-48. It also states that it will dissolve the stay whenever this court indicates that, in its view, the need for it no longer exists. *Id.* at 448. Following a hearing on this issue, we indicated in our order of May 1, 1975 that we concur in the discernible suggestion of Nixon v. Richey that the central purpose of Congress, in relation to all pending litigation, is to have an early and prior determination of the Act's constitutionality, and that we therefore had no disposition to request dissolution of the stay. Having now entered judgment in this action, we are simultaneously requesting the Court of Appeals to dissolve the stay, thus permitting the consolidated cases to proceed in whatever manner seems fit in light of the possibility of appeals in this action, *see generally* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.416[1-4] (1974), and cases cited.

At present, there remain outstanding four orders issued in Nixon v. Sampson granting, or modifying the grant of, temporary injunctive relief. *See* Order of October 21, 1974; Supplemental Order of October 22, 1974; Order of October 31, 1974; Order of November 7, 1974. Their net effect is as follows:

granted a motion by the Special Prosecutor to intervene, although he subsequently moved for and was granted

1) to enjoin the government defendants from effectuating the Nixon-Sampson agreement;

2) to enjoin the government defendants from disclosing, transferring, disposing of, or otherwise making known the presidential materials in custody, except as specifically provided;

3) to permit production of materials pursuant to subpoena, discovery demand, or court order in any civil or criminal case, at the behest of a grand jury, or at the behest of the Special Prosecutor;

4) to provide Mr. Nixon with access to the materials for the sole purpose of preparing to testify in the Watergate trial or determining whether to raise any privileges or defenses in opposition to demands or subpoenas for materials;

5) to permit use of the materials for current government business upon prior notification to counsel for Mr. Nixon and with the consent of Philip W. Buchen;

6) to grant any past or present member of the White House Staff, any defendant in the Watergate criminal trial, or the Special Prosecutor access to materials under the following procedures:

a) a request shall be made to Philip W. Buchen, who shall advise counsel to Mr. Nixon, the court, and the Special Prosecutor of the request;

b) upon receiving the consent of counsel to Mr. Nixon, said person shall be granted access to his/her files for the purpose of taking notes;

c) in the event it is desired to reproduce materials, notice shall be served upon counsel to Mr. Nixon, Mr. Buchen, the Special Prosecutor, and the court;

d) counsel for Mr. Nixon or Mr. Buchen shall give or withhold consent to reproduction of materials, and if consent is withheld, copies shall not be made;

e) any search for materials shall be conducted jointly by Mr. Buchen and counsel to Mr. Nixon, or his designated agent.

leave to withdraw.[11] That order also permitted the other litigants in the consolidated cases who were not named parties in the instant case—Lillian Hellman, *et al.*, Reporters Committee for the Freedom of the Press, *et al.*, and Jack Anderson—to proceed in this case as intervenor-defendants on a joint basis. It also noted our view that nothing in section 105(a), or the meager legislative history dealing with this provision, suggests that it was meant to override or negate the provisions of 28 U.S.C. §§ 2282, 2284 (1970), calling for convention of a three-judge court. *See Nixon v. Richey, supra,* at 441-42.

The order also declined to consider separately plaintiff's motion for a preliminary injunction, instead deferring that question and combining it with a decision on the merits. We now turn to that decision.

II. The Scope of Inquiry

Before examining the various constitutional issues, we emphasize that the question before us is a narrow one: Is the regulatory scheme enacted by Congress unconsti-

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[11] The Special Prosecutor's Motion for leave to withdraw, filed on September 8, 1975, stated that he had received or listened to all tape recordings that were arguably relevant to specified investigations, and had examined all files likely to contain documents pertinent to ongoing investigations and had obtained all such documents contained therein. These materials had been obtained under procedures agreed to by the Special Prosecutor and counsel for Mr. Nixon, *see* note 10 *supra,* who assured the Special Prosecutor that such procedures would remain in effect. In light of that assurance, the existence of subpoena power for use by the Special Prosecutor if necessary, and the representation by the United States of all positions the Special Prosecutor would have taken in this litigation, the Special Prosecutor believed his continuing participation to be unnecessary. We agreed, and on September 17, 1975, granted his motion.

tutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)? Our obligation to restrict our review to the question of the Act's facial validity *vel non* derives from two sources. First, as a three-judge district court, our jurisdiction is invoked because of the need to adjudicate the availability of injunctive relief against enforcement of a statute on constitutional grounds. The Supreme Court has traditionally taken a "constrictive view" of this jurisdiction. *E.g., Hagans v. Lavine,* 415 U.S. 528, 543-45 (1974); *Mitchell v. Donovan,* 398 U.S. 427, 431 (1970) (per curiam); *Phillips v. United States,* 312 U.S. 246, 251 (1941). We have already indicated in our order of May 1, 1975 that we would restrict our review accordingly to consideration of the propriety of injunctive relief against the alleged facial unconstitutionality of the statute.

Second, we are under the prudential duty to rule on the constitutionality of congressional legislation only where absolutely necessary, *e.g., Rosenberg v. Fleuti,* 374 U.S. 449, 451 (1963); *Harmon v. Brucker,* 355 U.S. 579, 581 (1958) (per curiam); *Powell v. Washington Metropolitan Area Transit Comm'n,* 466 F.2d 466, 468 (D.C. Cir. 1972) (per curiam); to formulate a rule of law no broader than is necessary to decide the case before us, *e.g., Garner v. Louisiana,* 368 U.S. 157, 163 (1961); *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450, 461 (1945); to seek a statutory construction that avoids constitutional difficulties, *e.g., Johnson v. Robison,* 415 U.S. 361, 366-67 (1974); *United States v. Witkovich,* 353 U.S. 194, 201-02 (1957); *Buckley v. Valeo,* 519 F.2d 821, 874 (D.C. Cir. 1975) (per curiam) (en banc), *prob. juris. noted,* 96 S. Ct. 32 (Oct. 6, 1975) (Nos. 436, 437); and to refrain from ruling on speculative questions based upon purely hypothetical fact situations that may never come to pass, *e.g., Thorpe v. Hous-*

ing Authority, 393 U.S. 268, 283-84 (1969); *United States v. Raines*, 362 U.S. 17, 20-22 (1960); *Langston v. Johnson*, 478 F.2d 915, 917 (D.C. Cir. 1973).

The principal policies that underlie these concerns—the aid to constitutional adjudication provided by a concrete set of facts and adversary presentation of argument directed to those facts, and the need to limit exercise of the delicate power of judicial review to cases inescapably calling into question the constitutionality of a statute—are peculiarly relevant to the legislative scheme before us. The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a).[12] Those factors provide broad latitude to the Administrator in establishing the processes and standards under which the materials will be reviewed and public access to them afforded. With respect to constitutional challenges levelled against the Act by plaintiff, subsection 104(a)(5) is especially noteworthy. That subsection directs the Administrator to take into account, *inter alia*, "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials."

Because of the Senate's disapproval of GSA's initial proposed regulations, there are currently no regulations in effect. When regulations finally become effective, however, they could, if drafted with careful attention to the directive of subsection 104(a)(5), eliminate the basis for some of the allegations raised by Mr. Nixon that his rights

[12] One qualification of the statement in text must be made. *See* note 18 *infra*.

will be infringed.[13] Objections he now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass under the regulations finally placed in effect. Although written in the somewhat different context of a state statute with many distinct provisions, the words of the Supreme Court in *Watson v. Buck*, 313 U.S. 387 (1941), are apposite to the problem before us:

> No one can foresee the varying applications of these separate provisions which conceivably might be made. A law which is constitutional as applied in one manner may still contravene the Constitution as applied in another. Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications, courts have in the main found it wiser to delay passing upon the constitutionality of all the

[13] By its terms, § 104(a)(5) speaks to protection of any party's "opportunity to *assert* any legally or constitutionally based right or privilege which would prevent or otherwise limit public access" (emphasis supplied). It would be possible to adopt one (or both) of two niggardly readings of this provision: (1) the subsection applies only to limitations on access, rather than limitations on the screening process, *see* pp. 28-30 *infra;* or (2) the subsection applies only to the establishment of procedures by which such rights can be asserted, rather than standards that themselves seek to provide protection. Neither reading, it seems to us, is required by the language, and each appears to deny § 104(a)(5) the scope necessary to serve its purpose of permitting the Administrator to consider the constitutionality of any regulations he drafts to ensure that they do not deprive anyone of his constitutional protections. The second reading plainly, and the first reading impliedly, conflict with clear manifestations of congressional intent in the legislative record. *See* pp. 24-25 *infra*. The Proposed Regulations on Public Access, as revised, submitted to Congress on October 15, 1975 [hereinafter "Proposed Regulations"], plainly reject the second reading. *See* §§ 105-63.402-1, .402-2. Hence, we find no reason to so constrict the meaning of § 104(a)(5).

> separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured. Passing upon the possible significance of the manifold provisions of a broad statute in advance of efforts to apply the separate provisions is analogous to rendering an advisory opinion upon a statute or a declaratory judgment upon a hypothetical case.

Id. at 402 (alternative holding); *accord, Communist Party v. SACB*, 367 U.S. 1, 71 (1961); *United States v. Spector*, 343 U.S. 169, 172 (1952). There is, therefore, no need and no justification for this court now to reach constitutional claims directed at the regulations and that the promulgation of regulations might eliminate, limit, or cast in a different light.

It is not unlikely that the Administrator may find that the seven factors listed in section 104(a) do not coexist in perfect harmony, and compromise and accommodation of conflicting directives will be necessary.[14] Yet in resolving such conflicts the paramount concern will be that enunciated in subsection 104(a)(5), for it is to be

[14] Even within the intervenor-defendants, it is possible to discern important differences in their broader objectives. Jack Anderson is a journalist, as are some members of both of the groups of intervenor-defendants. Both of those groups also include historians and political scientists. The interest of journalists would seem to lie in the ability to review, report, and comment upon the materials in question with some immediacy. However, as one noted historian has remarked, the interest of members of his profession is quite different:

> The real interest of the historian is in a rich, honest and revealing record rather than in instant access; and the more he pushes for instant access, the more he will impoverish the record. . . . The certainty of immediate disclosure would have a chilling effect; and the result would be the degeneration of the research quality of documentary evidence.

Schlesinger, *Who Owns a President's Papers?*, 27 MANUSCRIPTS 178, 181 (1975).

assumed that Congress intended its regulatory scheme to conform to constitutional requirements. That general canon of construction, here reinforced by several distinct aspects of the Act,[15] will require the Administrator to make a considered judgment about the constitutionality of any regulatory scheme he adopts, for, as the Supreme Court has recently reminded us, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution." *United States v. Nixon*, 418 U.S. 683, 703 (1974).[16]

[15] There are a number of indications of congressional concern that this Act operate within constitutional bounds. In addition to the standard separability clause in subsection 105(b), these include (1) the express reservation in subsection 102(b) of the opportunity of any party to raise constitutional rights, privileges or defenses in resisting any legal process directed to the materials; (2) the reservation in subsection 102(c) of plaintiff's right of access to the materials; (3) the directive in subsection 104(a)(4) to consider the need to protect the right to a free and impartial trial; (4) subsection 104(a)(5), as has been discussed in text; and (5) the provision under subsection 105(c) of funds, if necessary, to compensate any individual found to have been deprived of private property.

[16] In his Reply Brief at 69 n.42, plaintiff raises for the first time the argument that one of the seven factors included in § 104(a)—specifically § 104(a)(1)—has underlying it the impermissible purpose of disclosure to the public of information concerning government processes. As a result, plaintiff asserts, any regulations resulting from consideration of that factor are constitutionally defective regardless of their substance. However, we find no reason to find that disclosure of information to the public is an improper purpose. It is one, to be sure, that may at some point collide with various constitutional protections involving privacy or confidentiality, but that is not an indication that it is *per se* impermissible, as plaintiff himself concedes elsewhere, *see* Reply Brief at 16-17. *See also* note 46 *infra*. Indeed, this purpose has been identified in numerous cases as the principal objective of the Freedom of Information Act, 5 U.S.C. § 552 (1970), with no indication

The legislative history suggests that Congress shared this view of the Administrator's duties. Senator Javits, one of the bill's three sponsors, had the following to say about the criteria of section 104(a):

> The criteria, Mr. President, endeavor to protect due process for individuals who may be named in the papers as well as any privilege which may be involved in the papers, and of course the necessary access of the former President himself.
>
> In short, the argument that the bill authorizes absolute unrestricted public access does not stand up in the face of the criteria and the requirement for regulations which we have inserted in the bill today.
>
> There will be no broad and unrestricted public access which could nullify the criteria to which I have referred.

120 CONG. REC. S 18244 (daily ed. Oct. 3, 1974). Senator Nelson, the bill's draftsman and principal sponsor, expressed the same view:

> The sixth principal provision concerns public access to the materials. A primary purpose here is to inform the American people of the full truth concerning the Watergate scandals. However, this purpose should not override all regard for the rights of the individual to privacy and a fair trial.

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that it has any constitutional infirmity. *E.g., Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 17-18 and cases cited n.17 (1974); *EPA v. Mink*, 410 U.S. 73, 79-80 (1973); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974). Thus, the premise of impermissibility upon which this argument rests is fundamentally unsound, and that disposes of the issue without the need to consider the validity of the second part of the argument. *Cf.* Palmer v. Thompson, 403 U.S. 217 (1971); *compare* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, *with* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

Id. at S 18236. Senator Ervin, the third sponsor and the floor manager of the bill, was in agreement with this view.

> Nobody's rights are affected by this bill, because it provides, as far as privacy is concerned, that the regulations of the Administrator shall take into account . . . the opportunity to assert any legally or constitutionally based right which would prevent or otherwise limit access to the tape recordings and other materials.

Id. at S 18329. (daily ed. Oct. 4, 1974). *See also id.* at S 18320 (remarks of Sen. Ervin); *id.* at H 11209 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas).

Finally, in the event that a particular regulation, or an entire set of regulations, might be constitutionally defective, judicial review under Section 105(a) of the statute is available.[17] If a reviewing court were com-

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[17] Of course, Congress has interposed itself between the formulation of regulations and the possibility of judicial review of regulations that have become effective, by reserving a power in either House to disapprove within 90 legislative days regulations submitted to Congress. *See* § 104(b)(1). Moreover, it has stated that the Administrator may not issue any regulation or any change in a regulation if that regulation or change is disapproved by either House. § 104(b)(2). The validity of such a delegation by Congress to each House has never been authoritatively established, *see* Testimony of Antonin Scalia on H.R. 8231 & H.R. 3658 before the Subcomm. on Administrative Law and Governmental Relations of the House Judiciary Comm., Oct. 29, 1975; though were it thought to be unconstitutional, only §§ 104(b)(1), (2) would need to be invalidated. If Congress were to disapprove regulations that the Administrator believed necessary to afford adequate constitutional protections, the Administrator would find himself in a difficult dilemma. But even were he to decide that he would be obligated under § 104(b)(2) to adhere to disapproval by one House of Congress, that obligation would only delay, not defeat, the promulgation of an effective set of

pelled to invalidate challenged regulations, alternatives more consistent with constitutional requirements could thereafter be adopted.

It is for compelling reasons, therefore, that we limit our inquiry in this case. In particular, we decline to reach challenges based upon the alleged infringement of plaintiff's constitutional rights or privileges caused by the possible access to materials, after they have been processed, by members of the public.[18] The imposition

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regulations that protects constitutional rights. For if a reviewing court were to hold that a set of regulations, whose content was due in part to exercise of the power to disapprove delegated to a single House of Congress, were constitutionally defective, the Administrator at that point would presumably be free to draft regulations more protective of constitutional rights, ignoring any activity of a single House if a court had already found such activity to render regulations unconstitutional. Thus, even were we to assume that one House of Congress already has acted, *see* 121 CONG. REC. S 15803-08 (daily ed. Sept. 11, 1975), or will act, pursuant to a validly delegated power, to prevent the Administrator from adopting regulations necessary to protect constitutional rights, that would not argue for addressing any questions other than those to which we have limited ourselves.

[18] Subsection 102(d), provides that the materials falling within the scope of § 101 shall "at all times" be available to executive agencies or departments for "lawful Government use," an access right that is distinct from the public access to be provided under § 104(a). Broadly read, § 102(d) might be thought to authorize wholesale access by executive officials in the Federal Government for a wide range of purposes, some of which might lead, intentionally or unintentionally, to widespread circulation of materials within or without the executive branch. *See also* note 61 *infra*. We find no reason, however, to subscribe to such a reading. For all of the reasons provided in this part of the opinion, we believe that Congress must be viewed as having authorized only such access by executive officials as will not violate any of the constitutional rights or privileges of Mr. Nixon discussed below. To find otherwise would require us to strike down as invalid that subsection of

of restrictions on access by the public, or by anyone other than executive officials for particular purposes, for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications, could eliminate the basis for plaintiff's objections to public access.[19] Providing for the return to Mr. Nixon,

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the Act (though, in light of the separability clause and the lack of dependence of other aspects of the regulatory scheme on that provision, not the entire Act), a course we must eschew if possible. Because it is easy and sensible to read the words "lawful Government use" to include the notion of "Government use consistent with such law as derives from constitutional strictures," and because the legislative history does not counsel a contrary course, *see* pp. 24-25 *supra*, we endorse such a reading.

[19] There exists a basic set of donor-imposed access restrictions that was first formulated by Herbert Hoover, *see* Affidavit of Richard A. Jacobs, exh. A, and followed by Presidents Eisenhower, *see id.*, exh. F; Kennedy, *see id.*, exh. G; and Johnson, *see id.*, exh. I. Under this scheme the following materials would be restricted:

1) materials that are security-classified;

2) materials whose disclosure would be prejudicial to foreign affairs;

3) materials containing statements made by or to a President in confidence;

4) materials relating to the President's family, personal, or business affairs or to such affairs of individuals corresponding with the President;

5) materials containing statements about individuals that might be used to embarass or harass them or members of their families;

6) such other materials as the President or his representative might designate as appropriate for restriction.

President Franklin Roosevelt imposed restrictions very similar to numbers 1, 2, 4, and 5, and in addition restricted (a) investigative reports on individuals, (b) applications and recommendations for positions, and (c) documents containing derogatory remarks about an individual. Affidavit of William

pursuant to subsections 104(a)(5) and (7), of materials implicating his personal or political privacy rights could have similar effect. Because we believe such regulations fall plainly within the Administrator's authority, we find no need to adjudicate claims that such regulations could moot.[20]

What remains before us, then, is the question whether the process by which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional. All of the parties appear to agree that more or less comprehensive review by government archivists seems contemplated under the Act—processing much like that used to review the materials accumulated by presidential administrations, and deposited in presidential libraries, since President Franklin D. Roosevelt's time. *See* pp. 42-46 and notes 31-33 *infra*. In considering a comprehensive review process, however, we do not overlook the possibility that procedures might be adopted which would permit some deviation from reviewing each tape recording or document on a literally word-by-word basis. Without suggesting that the Constitution requires adoption of any of the following—a question about which we express no view—we note a variety of archival practices that might be adopted—either be-

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R. Emerson, July 22, 1975, exh. B. President Truman's restrictions were like those of Hoover, Eisenhower, Kennedy, and Johnson, except that he made no provision, like number 6 above, for restriction merely at his own instance. Affidavit of Richard A. Jacobs, exh. D.

See also note 52 *infra* (describing one restriction on public access contained in the Proposed Regulations).

[20] In Buckley v. Valeo, *supra*, the Court of Appeals for this Circuit faced a not dissimilar situation, and adopted a similar approach. *See* p. 93 *infra*.

cause expressly mandated by regulation[21] or merely as a matter of course—to limit any invasion of plaintiff's constitutionally protected interests by the screening process:

> 1. A practice of requiring archivists to make the minimal intrusion necessary to classify material. Identification by signature, the file within which material is found, general nature (as with diaries, or dictabelts serving the same function), a cursory glance at the contents, or other means could significantly limit infringement of plaintiff's interests without undermining the effectiveness of screening by governmental personnel. Participation by Mr. Nixon in preliminary identification of material that might be processed without word-by-word review would facilitate such a procedure.[22]

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[21] The commentary to § 105-63.401-2 of the Proposed Regulations, *supra* note 13, suggests that each individual document or tape will have to be processed "word-by-word." Were such a regulation to be placed into effect, and challenged in litigation, a court would then be forced to consider whether the phrase "word-by-word" is to be interpreted with a literalness that would preclude adherence to any of the three practices outlined in text. If it concluded that such preclusion was inescapable, it would then have to consider whether any of those practices is constitutionally required. Surely if the answer to the second inquiry appeared to be affirmative and called into question the constitutionality of the processing scheme, the court would be especially wary of adopting a literal reading of "word-by-word" that precluded following any of the three practices. But if in the final balance it found that a regulation actually in effect strictly mandated a processing scheme that did not provide adequate protection of plaintiff's constitutional rights, that would require invalidation of only a regulation rather than the Act itself.

[22] The Supreme Court has suggested the appropriateness of such procedures in related situations on at least two occasions involving claims by the Executive that confidential government documents are not subject to disclosure. In both cases, the Court noted the possibility that the Government might

2. A practice of giving Mr. Nixon some voice in the designation of the personnel who will review the materials, perhaps by selecting from a body of archivists approved by the government.

3. A practice of giving Mr. Nixon notice of all proposed classifications of materials and an opportunity to obtain administrative and judicial review of them, on constitutional or other grounds, before they are effectuated.[23]

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demonstrate by extrinsic evidence that certain material was privileged and that, in such cases, the material should not even be reviewed by a judge *in camera*. *See EPA v. Mink*, 410 U.S. 73, 92-94 (1973); *United States v. Reynolds*, 345 U.S. 1, 10 (1953). *See also* pp. 81-82 *infra*.

[23] The Proposed Regulations, *supra* note 13, do not expressly provide that Mr. Nixon be notified of archival decisions to open particular materials to public access, although they do expressly provide for publication in the Federal Register of other archival decisions, *see* §§ 105-63.401-2(h), .401-3. Nonetheless, we believe that the Act, the overall scheme established by the regulations, and basic notions of procedural fairness all suggest that some practice should, and in all likelihood will, be adopted by which Mr. Nixon may obtain notice of decisions to permit public access to materials.

Subsection 104(a)(5) expressly requires the Administrator to take into account "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." Because of the vast quantity of materials, it would be difficult for plaintiff to assert that privacy rights require restricting access to particular items when he may not recall even what items are included in the materials or be able to reconstruct their contents. It is true that subsection 102(c) of the Act gives him a right of access to the materials, but surely that access right becomes far more meaningful, insofar as it is designed to aid him in determining whether to challenge the treatment of particular items, if he has some way of knowing what items are about to be made public. Otherwise, either Mr. Nixon must have perfect recall of the materials, which is difficult to expect, or the

There is, of course, no certainty that regulations restricting public access or practices narrowly tailoring the screening process will be adopted. Were we to try to anticipate all possible constitutional questions, however, we would run the risk of rendering an advisory opinion as to some questions if such regulations or practices were ultimately adopted. For that reason, and in light of the Administrator's duty to draft regulations that scrupulously protect the constitutional rights of all parties concerned, we discuss below only questions directed toward the statute on its face and aspects of the screening process that, in their broadest outlines, we believe will necessarily be included in any processing conducted under a valid set of regulations.

III. Claims Relating to the Separation of Powers

Mr. Nixon asserts two different challenges to the operation of the Act that derive from separation of powers concerns. First, he argues broadly that the Act infringes the powers of the President and hence represents an unconstitutional invasion of the executive sphere by Congress. Second, he insists that the Act infringes his presi-

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risk must be run that he would be unable to assert his privacy rights before public access, in his view, had already violated them. Similarly, the scheme of administrative and judicial appeals, *see* § 105-63.401-4, provided in part to protect personal rights against infringement by archival decisions, is extremely difficult to employ when those decisions are unknown.

We believe, then, that Mr. Nixon's right to challenge particular archival decisions as respects his privacy interests is hardly a meaningful one without notification of decisions that might threaten those rights. We have little doubt that a workable arrangement can be devised whereby Mr. Nixon's interests are protected with no significant disruption of the review process, and we believe that the spirit of the Act and the regulations requires no less.

dential privilege as recognized by the Supreme Court in *United States v. Nixon, supra*

In asserting a broad separation of powers claim, plaintiff points to a number of decisions suggesting that the three branches of government are totally distinct and autonomous, and that the separation of powers doctrine bars actions by one branch that even indirectly impinge upon another. Plaintiff's Brief at 83-85, *citing Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935), *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933), *and Springer v. Government of the Philippine Islands*, 277 U.S. 189, 201 (1928). *See also* Plaintiff's Brief at 95-96, *quoting Myers v. United States*, 272 U.S. 52, 167 (1926). Presidential control over the disposition of presidential papers is stated to be an essential incident of the conduct of the presidency, an incident sanctioned by past practice as well as necessity. Congressional interference with such control, so it is said, unconstitutionally infringes powers reserved to the executive branch.

Although the view that the separation of powers mandates three mutually exclusive branches, each entirely free from interference by the others, may once have been ascendant in the Supreme Court, it is inconsistent with the earliest formulations, as well as the most recent judicial and scholarly consideration, of the doctrine. Madison in THE FEDERALIST No. 47, reviewing the origins of separation of powers doctrine, stated that "[o]n the slightest view of the British constitution we must perceive, that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other." THE FEDERALIST 325 (J. Cooke ed. 1961). He continued by remarking that Montesquieu, the "oracle" always consulted on the subject, *id.* at 324,

> did not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other. His meaning, as his own words import,

> and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted.

Id. at 325-36 (emphasis in original). Madison illustrated and supported this position by noting that in the state constitutions, "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." *Id.* at 327.

Madison's view was shared by Justice Story, who wrote:

> But when we speak of a separation of the three great departments of the government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree.

I J. STORY, COMMENTARIES ON THE CONSTITUTION § 525 (M. Bigelow ed. 1905).

The view espoused in the cases upon which plaintiff relies reflects a stiffly formal and mechanistic view of government, one that does not admit of the need for flexibility in our constitutional system to respond to changed circumstances, newly perceived needs, and practical exigencies. The modern view of separation of powers rejects the metaphysical abstractions upon which Mr. Nixon would rely, and reverts instead to a more pragmatic, flexible, functional approach. It was well elaborated in Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

That excerpt was quoted approvingly most recently in *United States v. Nixon, supra*, at 707, in which the Supreme Court reiterated that "the separate powers were not intended to operate with absolute independence." *See also Youngstown Sheet & Tube Co. v. Sawyer, supra*, at 610 (Frankfurter, J., concurring) ("the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed.") That position has the universal endorsement of commentators. *See, e.g.*, 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.09 (1958); G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 400 (9th ed. 1975); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 28-30 (1965); Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1387-91 (1974); Ratner, *Executive Privilege, Self Incrimination, and the Separation of Powers Illusion*, 22 U.C.L.A. L. REV. 92-93 (1974).

We therefore decline to embrace plaintiff's archaic view of the separation of powers as requiring three airtight departments of government. This is not to say that we do not consider the preservation of executive autonomy to be an important concomitant of a system of separated powers. Rather, given the tension between the independence and interdependence of the three branches, separation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of

an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. *See United States v. Nixon, supra*, at 711-12; *Ratner, supra*, at 92-95.

The only impairment of the Executive's ability to perform its duties that plaintiff alleges the Act would cause is the detrimental impact that disclosure of communications given to the President in confidence would have on the ability of future Presidents to obtain the candid advice necessary for effective decisionmaking. The need for protection of such confidentiality, as deriving from the separation of powers, was recognized by the Supreme Court in *United States v. Nixon, supra*, at 708, in the form of a qualified privilege for certain executive communications. Both the Supreme Court and the court of appeals in this circuit, however, refused to recognize an absolute privilege, *id.* at 705-07; *Senate Select Comm. v. Nixon*, 498 F.2d 725, 729-30 (D.C. Cir. 1974) (en banc); *Nixon v. Sirica*, 487 F.2d 700, 712-16 (D.C. Cir. 1973) (en banc) (per curiam), instead analyzing with precision in each case how to accommodate the confidentiality protected by a qualified privilege to competing needs of other branches. The contrasting results of *United States v. Nixon* and *Nixon v. Sirica*, on the one hand, finding the needs of the grand jury to be paramount to the protection of executive confidentiality, and *Senate Select Committee*, on the other, finding that Committee's needs insufficiently compelling to justify an inroad on executive confidentiality, illustrate the need for particularized analysis rather than mechanistic formalism in resolving disputes between separate but interdependent branches.

Although Mr. Nixon denominates his claim as one of presidential rather than executive privilege, we do not assign any significance to semantic distinctions of this

kind in the context of the case at bar. What we have before us is a claim of privilege to protect the generalized interest in free and candid communication to the President in the formulation of executive policy.[24] This is the same privilege recognized in *United States v. Nixon*, *Nixon v. Sirica*, and *Senate Select Comm. v. Nixon*.[25] The questions we face are who can assert that privilege, how to define its scope, and how to gauge its force when compared to competing considerations.

Mr. Nixon's claim of privilege could be easily disposed of were we to hold that only an incumbent President may assert a privilege to protect presidential confidentiality, even as to communications that took place

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[24] Plaintiff's argument suggests that "executive privilege" relates to the need to protect secret information involving military and foreign affairs and national security, and can be asserted by the incumbent alone, whereas "presidential privilege" is designed to protect the generalized interest in confidentiality of all communications relating to executive decision-making, and can be asserted only by the individual who was President at the time of the communications. Plaintiff's Brief at 117-20. This case presents no problem concerning secret information pertaining to national security, and thus, like the Supreme Court in United States v. Nixon, *supra*, at 710-11, 712 & n.19, we express no view on the relevance to that problem of anything in this opinion. As to what plaintiff terms "presidential privilege," by calling it "presidential" rather than "executive" he in no way answers the open question as to whether a former President may assert such a privilege; semantic games do not decide difficult questions. In what follows, we refer to the privilege in question interchangeably as "executive" and "presidential."

[25] Thus, we have no occasion to consider the extent to which the constitutionally-based executive privilege recognized in United States v. Nixon, or, to the extent it is distinct, any common law privilege protecting executive confidentiality, encompasses confidential communications involving executive officials other than the President. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148-54 & n.17 (1975), and cases cited.

during prior administrations. Since President Ford has signed the legislation and, far from presently asserting that the processing scheme contemplated by the Act is invalid, his administration is before us defending it, the privilege protecting presidential confidentiality arguably could not be the basis for invalidating the Act.[26] That position has much to commend it. Invocation of executive privilege reflects a determination of where the public interest lies, which in turn requires full awareness and consideration of all the desiderata militating both for and against disclosure in a particular situation. The incumbent President alone is charged with the duty under the Constitution to make such a determination as part of his obligation to execute the laws, *Sun Oil Co. v. United States*, 514 F.2d 1020, 1027 (Ct. Cl. 1975) (Nichols, J., concurring), and he alone has the requisite knowledge of all facets of the problem and the unique perspective necessary to such a decision. 87 HARV. L. REV. 1557, 1565 (1974). It is for this reason that the analogous principle has been established, in both cases involving a privilege shielding the executive from the need to disclose secret information and cases involving a privilege shielding the generalized interest in executive confidentiality, that only the head of the department involved, and not his subordinates, may invoke the privilege. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); *Committe for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 793-94 (D.C. Cir. 1971) (per curiam) (by implication); *Mitchell v. Bass*, 252 F.2d 513, 516 (8th Cir. 1958); *Overby v. United States Fidelity and Guaranty Co.*, 224 F.2d 158, 162-63 (5th Cir. 1955). Furthermore, if the incumbent is not

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[26] The incumbent would, of course, retain the right to assert executive privilege in order to prevent public access to any materials whose disclosure he believed would undermine executive confidentiality and would not be in the public interest.

asserting privilege, there is little chance that disclosure would obstruct the ongoing formation and implementation of executive policy. *See* Cox, *supra*, at 1410 (by implication). Similarly, the incumbent has an interest in preventing disclosure of the confidences of predecessor administrators when he believes the effect will be to discourage candid presentation of views by his advisors; if he fails to raise a claim of privilege, surely the risk of impairing necessary confidentiality is attenuated.

In addition, to the extent that executive privilege is designed to shield executive officials, whose energies are and must be fully devoted to the vast governmental problems which they confront, from burdensome requests for information, *see United States v. Nixon*, *supra*, at 714, *quoting United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807) (privilege serves as a "'guard'" furnished to the President "'to protect him from being harassed by vexatious and unnecessary subpoenas'"); Cox, *supra*, at 1385; *cf. Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501-03 (1975); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967) (per curiam), a former President is in much less need than an incumbent.[27] Finally, an incumbent President, . re-

[27] There is a distinct question of the President's immunity from legal process, which more directly relates to the problem of vexatious demands for information, *See, e.g.*, Nixon v. Sirica, *supra*, at 708-12; G. GUNTHER, *supra*, at 457-59, 466-68; Freund, *The Supreme Court, 1973 Term—Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 19 (1974); Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 U.C.L.A. L. REV. 30, 33-34 (1974). The Supreme Court in United States v. Nixon failed to keep this issue distinct from the question of the proper scope of executive privilege. *See* 418 U.S. at 705-07; Gunther, *supra*, at 33-34; Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 U.C.L.A. L. REV. 76, 80 (1974). In light of the special circumstances of that case, we do not draw great significance from such a

sponsible to the electorate for his actions and subject to the political restraints of a continuing readjustment with Congress, is less likely to succumb to the temptation to abuse his authority to claim privilege. *See, e.g.*, Cox, *supra*, at 1430-32; Henkin, *Executive Privilege; Mr. Nixon Loses but the Presidency Largely Prevails*, 22 U.C.L.A. L. REV. 40, 43 (1974); Sofaer, *Book Review*, 88 HARV. L. REV. 281, 288-89, 292-94 (1974); Winter, *Book Review*, 83 YALE L. J. 1730, 1740-43 (1974); 87 HARV. L. REV. 1557, 1565 (1974). Mr. Nixon's voluntary disclosure, while in office and after great pressure had been exerted, of materials which he believed to be privileged, *see* 10 Weekly Comp. of Pres. Docs. 449, 450-58 (May 6, 1974), indicates that the political check on an incumbent is more than academic.

Several judicial pronouncements have held or suggested that a former President may not claim executive privilege. *See Sun Oil Co. v. United States*, *supra*, at 1027 (Nichols, J., concurring); Order and Memorandum of September 24, 1975 in *Halperin v. Kissinger*, Civil No. 1187-73 (D.D.C., filed June 14, 1973), at 1-2. At least one other has taken a contrary view. *See* Order of March 26, 1975 in *Apton v. Wilson*, Civil No. 798-72, (D.D.C., filed Apr. 24, 1972) *and Kuhn v. Wilson*, Civil No. 956-71 (D.D.C., filed May 13, 1971) (consolidated cases).[28]

merger. However, the clear holding in United States v. Nixon, *supra*, at 705-07 that the President is not immune from judicial process—the same holding that the court of appeals in this circuit had earlier made in Nixon v. Sirica, *supra*, at 708-12—does suggest that to the extent any weight is to be given to a President's need to avoid vexatious demands for information, the only pertinent doctrine now available is that of executive privilege.

[28] The principal argument in favor of permitting a former President to retain authority to assert presidential privilege is that political partisanship might prevail over determination of the public interest were an incumbent administration alone to have the ability to assert privilege. Executive confi-

We do not believe that we must align ourselves with one or the other of these views. *See Sun Oil Co. v. United States*, *supra*, at 1025. For even assuming *arguendo* that Mr. Nixon may, as a former President, assert executive privilege, such a claim is not as forceful as one raised by an incumbent. All of the reasons militating against permitting a former President to assert privilege without the support of the incumbent suggest, at the least, that if he is to be allowed to do so, such a claim carries much less weight than a claim asserted by the incumbent himself.

It is this less forceful claim that we consider as the basis for Nixon's challenge to the screening process by which the estimated 42,000,000 pages of documents, *see Hearings on GSA Regulations Implementing Presidential Recordings & Materials Preservation Act before the Senate Comm. on Gov't Operations*, 94th Cong., 1st Sess. at 83 (1975) [hereinafter cited as *Senate Hearings on GSA Regulations*], 880 tape recordings, *see id.* at 89, and other materials, *see id.* at 92, falling within section 101 of the Act will be reviewed. This claim quite plainly does not attach to all of these items, as Mr. Nixon concedes. *See* Plaintiff's Brief at 98. He estimates that he saw no more than 200,000 of the documents involved, Nixon Deposition at 15-16, and it is uncertain to what extent the privilege protecting presidential confidentiality recognized in *United States v. Nixon* attaches to materials he never saw.[39] In any event, like all privi-

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dentiality would consequently be inadequately protected, and thus the ultimate purpose of the privilege—to encourage free and open communication by executive officials—would be undermined.

[39] The answer to this question would depend upon at least two distinct factors: First, the extent to which confidential executive communications not involving *presidential* decision-making are privileged, *see* note 25 *supra*, and second, whether

leged communications, any communications here protected "must originate in a *confidence* that they will not be disclosed." 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961) (emphasis in original). Moreover, as *United States v. Nixon* suggests, the privilege is limited to communications "in performance of [a President's] responsibilities," 418 U.S. at 711, "of his office," *id.* at 713, and "in the process of shaping policies and making decisions," *id.* at 708. *See Nixon v. Sirica*, *supra*, at 717 ("in the President's performance of his official duties"); Cox, *supra*, at 1411 n.106; *cf. Eastland v. United States Servicemen's Fund*, *supra*, at 501 (immunity of legislators deriving from the Speech and Debate Clause encompasses actions within the " 'sphere of legitimate legislative activity' "), and cases cited. Undoubtedly, some of the 200,000 documents Mr. Nixon himself saw, as well as many of the others and significant portions of the tape recordings, are not related to the discharge of presidential duties and hence fall outside the scope of this protection. Moreover, a strong argument can be made that as to some of the materials encompassed by the Act and related to presidential duties, prior disclosures by Mr. Nixon, *see* 10 Weekly Comp. of Pres. Docs. 997, 1008-09 (Aug. 3, 1974); 10 *id.* 449, 450-58 (May 6, 1974); H.R. REP. NO. 93-1305, 93d Cong., 2d Sess., at 191-205 (1974), constitute a waiver of any privilege, *see* 8 J. WIGMORE, *supra*, §§ 2327-29; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 93 (2d ed. E. Cleary 1972); MODEL

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the privilege that attaches to presidential communications extends to communications never directly received by the President but rather channelled in a variety of ways to him or his advisors. However, since in our view there would be no constitutional infirmity in the statute even if a large proportion of the materials falling within the Act were thought to be protected by an executive privilege, we need not further consider these issues.

CODE OF EVIDENCE rule 231(b) (1942); UNIFORM RULES OF EVIDENCE rule 510 (1974); 87 HARV. L. REV. 1557, 1566-68 (1974), a factor that the court of appeals in this circuit believed to be relevant in judging the relative weight of the competing claims of the grand jury and the President in *Nixon v. Sirica*, *supra*, at 717-18.

Thus, the executive privilege issue reduces to the following: insofar as a claim of privilege by Mr. Nixon has force as to some of the materials covered by the Act, how serious an intrusion on executive confidentiality will screening by government archivists necessarily be, and do the objectives served by the Act justify that intrusion? Once the issue is properly framed in this fashion, we believe the answer to it is relatively easy.

The intrusion on executive confidentiality that review of the materials by government archivists would constitute is, in our view, at most minimal. For that confidentiality is not absolute over time, but rather begins to erode after an administration leaves office.[30] Presidents

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[30] In a recent English case, Lord Chief Justice Widgery was presented with an action by the Government to restrain publication of the diaries of former Cabinet Minister Richard Crossman, in order to protect the confidentiality of communications involving Cabinet Ministers. In deciding against the Government and in favor of publication, the Lord Chief Justice indicated that, in his view, the need for protection of such confidentiality diminishes over time:

> It may be that in the short run (for example, over a period of weeks or months) the public interest is equally compelling [as in cases involving national security] to maintain joint Cabinet responsibility and the protection of advice given by Civil Servants, but I would not accept without close investigation that such matters must, as a matter of course, retain protection after a period of years.
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> . . . .
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> There must, however, be a limit in time after which the confidential character of the information, and the duty of the court to restrain publication, will lapse.
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> . . . .
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> The court should intervene only in the clearest of cases where the continuing confidentiality of the material can be demonstrated.

Attorney General v. Jonathan Cape Ltd., (Q.B. Oct. 1, 1975), *reported in* London Times, Oct. 2, 1975, at 8, col. 1. The British Government has announced that no appeal will be taken. New York Times, Oct. 10, 1975, at 2, col. 4.

Mr. Nixon could be thought to agree with this view in its broadest form, for he indicated in his deposition that he believed that the 50-year restriction that President Johnson imposed upon access to the tape recordings he made while in office, *see* Affidavit of Mildred Stegall at 2, was "too long." Nixon Deposition at 53-54.

It is also interesting to note that Franklin D. Roosevelt, while indicating that some restrictions on public access might stay in effect as long as 50 years, stated that restrictions of an average length of 10-15 years should suffice. Affidavit of William R. Emerson, July 22, 1975, exh. A.

and advisors are likely to write memoirs or to engage in public reminiscences disclosing communications that once were confidential. *See* Intervenor-Defendants' Joint Memorandum at 132-37. Indeed, Mr. Nixon, like Lyndon Johnson before him, *see* Affidavit of Mildred Stegall at 1-2, established a taping system precisely to aid him in preparation of his memoirs, *see* Nixon Deposition at 72-73, a project for which his plans were known while in office, Nesbitt Deposition at 10, 58-60. Every President since Herbert Hoover has deposited presidential papers in presidential libraries, *see Senate Hearings on GSA Regulations* at 105, 246-47; Affidavit of Daniel J. Reed at 1, an example Mr. Nixon says he intended to follow, *see* Nixon Affidavit at 17-18; *see also* Affidavit of Richard A. Jacobs at 7-8. Over time, access restrictions have been removed from most of the materials on deposit, affording members of the public access to communications that,

at the time they were made, were confidential.[31] Hence, there has not been any practice of permanently preserving executive confidentiality in recent decades. On the contrary, in an era when both executive responsibilities and the quantity of presidential papers were increasing,[32] every President since the establishment in 1934 of the

[31] In the Hoover Library, there are no restrictions on presidential papers, although some restrictions exist with respect to personal and private material. Letter of July 17, 1975 from Thomas T. Thalken, Director of the Hoover Library, to R. Stan Mortenson, at 1. In the Roosevelt Library, less than 0.5% of the materials are restricted. Affidavit of William R. Emerson, July 23, 1975, at 2. There is no evidence in the record as to the percentage of materials currently under restriction in the Truman or Eisenhower Libraries. In the Kennedy Library, 85% of the material has been processed, and of the processed materials, only 0.6% is under donor (as distinguished from security-related) restriction. Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 3. In the Johnson Library, review of nonclassified material for Johnson's presidential period has been virtually completed, and more than 99% of all non-security classified materials are unrestricted. Affidavit of Harry J. Middleton at 3.

In each of the presidential libraries, provision has been made for the removal of restrictions when the passage of time has eliminated the circumstances originally thought to require imposition of restrictions. *See* Affidavit of Richard A. Jacobs, exhs. A, D, F, H, I; Affidavit of William R. Emerson, July 22, 1975, exh. B; Affidavit of William R. Emerson, July 23, 1975, at 2.

[32] The various presidential libraries contain the following numbers of pages of documents from the presidential period: for Hoover, 1 million; for Roosevelt, 10.5 million; for Truman, 5.8 million; for Eisenhower, 11 million; for Kennedy, 13 million; and for Johnson, 17 million. Affidavit of Daniel J. Reed at 2. These figures, especially when adjusted for the number of years each President was in office, reveal both the pattern of increase and the huge gap between Mr. Nixon's 42 million pages of documents and the number of pages of any of his predecessors.

National Archives (and Herbert Hoover as well) has turned over presidential papers for governmental preservation and eventual disclosure.

Perhaps most important, the screening process uniformly employed in these libraries—and therefore the practice that present executive officials would likely expect—involves comprehensive review by archivists of the materials on deposit, including those upon which access restrictions are ultimately imposed.[33] We would have trouble under any circumstances finding that mere screening by archivists, whose record for discretion in handling confidential material is unblemished, *e.g.*, Affidavit of William R. Emerson, July 23, 1975, at 2-3; Affidavit of Harry J. Middleton at 2; Affidavit of John Stewart at 3-4, substantially infringes executive confidentiality, especially in light of the practices that might be adopted, *see* pp. 28-30 *supra*, to limit the intrusiveness of review. *Cf. United States v. Nixon*, *supra*, at 706 (finding it "difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection

[33] *See* Affidavit of Richard A. Jacobs at 3, 4-5, 5-6, 8 & exhs. A, D, F, G, & I; Affidavit of William R. Emerson, July 23, 1975, at 1-2; Affidavit of William R. Emerson, July 22, 1975, at 2-3; Affidavit of Daniel J. Reed at 2-3; Affidavit of John Stewart at 3-4; Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 3.

It is true that past Presidents who have deposited materials in presidential libraries have typically removed from the materials deposited, or placed under seal, a few materials which they did not wish even archival personnel to view. But these exclusions have typically centered not on materials involving confidential government decisionmaking, but rather on materials involving personal, political, family, and business affairs. *See* note 54 *infra*.

with all the protection that a district court will be obliged to provide"); *Sun Oil Co. v. United States, supra,* at 1024. But when that very process is one that must fairly have been anticipated by executive officials in the Nixon administration, the argument that such screening is likely to stifle free and open communication in the future loses virtually all weight whatsoever.

There was, moreover, adequate justification for the congressional decision to entrust custody of the documents and the responsibility for their screening to GSA rather than Mr. Nixon. Chief Executives are not by nature professional archivists, and they lack expertise as to what materials may prove to be of historical value. *See* H.R. REP. No. 93-1507, 93d Cong. 2d Sess., at 6 (1974) (*quoting* Franklin D. Roosevelt):

> [Presidential material] should be kept in one place and kept in its original form because Presidential papers and other public papers have been culled over during the lifetime of the owner, and the owner has thrown out a good deal of material which he personally did not consider of any importance which, however, from the point of view of factual history, may have been of the utmost importance.

Review of materials such as these requires both enormous expertise and enormous manpower, *see Senate Hearings on GSA Regulations* at 12-13, 90-132, and Congress could legitimately wish to establish regularized procedures to ensure that the process by which the materials would be reviewed would be adequate to the task. Congress might also have been concerned that those entrusted with reviewing such materials be not only expert, *see* Affidavit of Daniel J. Reed at 2-3, but disinterested. Any former President is virtually certain to be concerned with the light in which history will view the record of his tenure. His quite natural hope is that his conduct will be viewed with favor, and if he were to possess unbridled control

over the papers of his administration—the raw materials from which historical judgments will be fashioned—there is always some risk that those items that might paint a different picture from the one he would like to portray will be subject to destruction or alteration, or otherwise unavailable to various government agencies and members of the public.

That risk might rationally be thought by Congress to be considerably magnified by reference to the circumstances surrounding Mr. Nixon's departure from office. The investigations conducted by the House Judiciary Committee (culminating in a recommendation that Mr. Nixon be impeached), the Watergate Special Prosecution Force, and the Senate Select Committee on Presidential Campaign Activities, and the substantial evidence they brought forth which might reasonably have been thought by Congress to suggest that there was misconduct on the part of Mr. Nixon and his close associates, are too familiar and too well-recorded elsewhere to merit elaboration by us. *See* H.R. REP. No. 93-1305, 93d Cong., 2d Sess. (1974); S. REP. No. 93-981, 93d Cong., 2d Sess. (1974); Watergate Special Prosecution Force, *Report,* [hereinafter WSPF *Report*] Oct., 1975, and sources cited 265-73. The temptation to distort or destroy the historical record might be thought by Congress to be less resistible in the event that the materials provided some foundation for allegations that misconduct took place.[34] Without

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[34] It is instructive to note the fate of the papers accumulated during the administration of Warren Harding, whose presidency was marked by the Teapot Dome affair, a highly publicized political scandal which, at least in terms of notoriety, was not unlike Watergate. After Harding's death while in office, the papers were packed and stored. Mrs. Harding undertook to remove and examine the "Private Office" material, and "[h]er objective seems to have been the destruction of any material which might have proven harmful to the memory of her husband." She burned some papers while they

indicating any view about the accuracy of these or any other allegations, we believe that Congress had before it an adequate basis for concluding that responsible processing of the materials in accordance with important public interests could be better ensured if the materials were entrusted to government archivists.[35]

The simplest way of describing the public interests served by the Act is to merge all of them under the

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were still at the White House. After the remainder were shipped to Ohio, Mrs. Harding "alternately designat[ed] individual items or entire folders for destruction. . . ." "The amount [sic] of files destroyed by Mrs. Harding cannot be accurately ascertained; though gaps in the file numbers of the private office papers do indicate that she may have burned as much or more than half the material available to her." Lentz, *The Warren G. Harding Papers*, at 2-3 & n.3 (Ohio Historical Society, Columbus, Ohio 1970).

The presidential papers of Presidents Pierce, Arthur, and Coolidge may have suffered from destruction initiated or authorized by these Presidents. McDonough, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 2, 5 (1975).

[35] Mr. Nixon suggests in his Reply Brief at 5 that if Congress' real concern were preservation of the materials from destruction, legislation could have been more narrowly tailored merely by prohibiting Mr. Nixon or anyone else from destroying any materials. We believe this argument misses the point. To begin with, Congress might legitimately have entertained doubts about whether Mr. Nixon would not violate such a prohibition. Moreover, placing the materials in custody not only insures against destruction—it also is the predicate to establishing a certain and effective review process to classify the materials, and to the extent that is permitted constitutionally, to provide access to them. A law that prohibited destruction and mandated government custody to ensure safekeeping, but nothing more, would not adequately serve congressional objectives, for those objectives are broader than mere prevention of destruction, and as we proceed to discuss, depend upon eventual access to particular materials by various government agencies or members of the public.

rubric of preservation of an accurate and complete historical record. Although such a characterization is justifiable, it belies the multiplicity of ways in which preservation serves vital national interests. Two interests in particular seem to us to be of special importance and plainly to be furthered by the Act, even were restrictive controls on access by the general public imposed by regulation.

First, and most broadly, the Act serves the national interest by preserving materials upon which historians must draw in order accurately to recount and to judge the political history of our time. *See, e.g.*, S. REP. No. 93-1181, 93d Cong., 2d Sess., at 1, 3 (1974); H.R. REP. No. 93-1507, 93d Cong. 2d Sess., at 2, 3, 8 (1974); *Senate Hearings on GSA Regulations* at 256; 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18235 (daily ed. Oct. 3, 1974); *id.* at S 18248 (remarks of Sen. Ervin); *id.* at S 18259 (remarks of Sen. Huddleston); *id.* at S 18260 (remarks of Sen. Ribicoff); *id.* at S 18261 (remarks of Sen. Muskie); *id.* at S 18325 (daily ed. Oct. 4, 1974) (remarks of Sen. Nelson); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas). *See also* sections 101(b)(1), 104(a)(7) of the Act.[36] Moreover, the Act may provide a scheme by which the materials are not only preserved, but may be screened promptly and professionally to ensure that when materials become available to public access, they will be readily usable. *See generally, e.g., Hearings on GSA Regulations* at 1-232. Congress might prop-

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[36] As of June 30, 1975, the Roosevelt library had issued 5,009 research passes, each valid for one year. Some 222 of the researchers using these passes were representatives of the media or employees of local, foreign, or the Federal governments. The remainder were scholars, students, writers, genealogists, and other researchers. Affidavit of William R. Emerson, July 22, 1975, at 3. Plainly, then, the Roosevelt library has been widely used for historical purposes.

erly have shared the sentiment of Harry S. Truman that is inscribed at the entrance to the library housing the presidential papers of his administration:

> This library will belong to the people of the United States. My papers will be the property of the people and be accessible to them. And this is as it should be. The papers of the Presidents are among the most valuable sources of material for history. They ought to be preserved and they ought to be used.

Whistle Stop: The Harry S. Truman Library Institute Newsletter, Vol. 3, No. 2, Spring, 1975, at 1.[37] It would serve little purpose to recount all of the ways in which the ability of a nation's citizens to understand their past enriches their lives and helps them to evaluate and perhaps to shape the present and future.[38] It should suffice

[37] President Truman is not the only former Chief Executive to recognize the importance of this need. *See* note 53 *infra*. Indeed, Mr. Nixon himself has stated that he believes the materials at issue to be of great importance to future historians:

> A. [Mr. Nixon] . . . My reason for approving [the tape recording system in presidential offices] was primarily because of the historical significance. I knew of it, particularly in the foreign policy area, of the conversations that were taking place and I felt having those conversations taped for purpose [sic] of history would be very, very useful and that it [sic] why it was done.
>
> Q. That was the reason?
>
> A. That was my primary motivation.

Nixon Deposition at 72-73.

[38] Senator Huddleston expressed one view as follows:

> There is a maxim which says we should learn from history in order not to repeat our mistakes. However, if one man is allowed to selectively edit a substantial portion of our history at his own discretion we may very well be destined to repeat our mistakes, only on a grander scale next time. This is why it is extremely vital that we provide the means for settling this matter as soon as possible.

120 CONG. REC. S 18259 (daily ed. Oct. 3, 1974).

to say that promotion of such understanding could hardly be more integral to a society based on democratic prin-

The distinguished English historian J. H. Plumb has recently discussed with eloquence the uses of history:

> There has so far always been a need in human societies to possess a sense of worth and of value. This, of course, may be provided in non-historical ways. . . . Some men and women can derive it from the richness of their own instinctive lives. . . . The majority of men and women, however, need the dimension of time because they are conscious of it. They realize that they are part of an historical process that has changed over the centuries, that time for men and women and their societies can never be static, or at least has never been static; that the process of change has accelerated and is accelerating so that they require to know what the nature of this process has been and is. They need an historical past, objective and true.
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> . . . .
>
> It is not only necessary to discover, as accurately as the most sophisticated use of evidence will allow, things as they actually were, but also why they were so, and why they changed; for no human societies, not one, have ever stood still. Although we carry within ourselves and within our societies innumerable relics of the past, we have discarded, outgrown, neglected and lost far more. . . . The historian's purpose, therefore, is to deepen understanding about men and society, not merely for its own sake, but in the hope that a profounder knowledge, a profounder awareness will help to mould human attitudes and human actions.

J. PLUMB, THE DEATH OF THE PAST 16, 105-06 (1970). *See also* Judge Gasch's Memorandum-Order of April 23, 1975 in Don't Tear It Down, Inc., v. GSA, Civil No. 74-381 (D.D.C. filed Mar. 4, 1974), at 10-11, *reported in* 103 DAILY WASH. L. REP. 1921, 1925 (Nov. 11, 1975).

ciples and devoted to freedom of expression in the political sphere as well as others.[39]

Second, preservation of these materials is needed to ensure their availability for successive administrations engaged in policymaking. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 3, 4, 5 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 3 (1974); 120 CONG. REC. H 11211 (daily ed. Dec. 3, 1974) (remarks of Rep. Abzug). *See also* section 102(d) of the Act. Govern-

[39] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring):

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

See also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975) ("Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records. . . ."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969) ("the First Amendment goal of producing an informed public capable of conducting its own affairs"); Buckley v. Valeo, *supra*, 519 F.2d at 867; Attorney General v. Jonathan Cape Ltd., *supra* note 30 (permitting publication of confidential diaries of a British Cabinet Minister serves the "public interest" in "freedom of speech"); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57.

mental programs and policies do not expire every four or eight years; the information and lessons gained from past experience do not evaporate the moment a new President is inaugurated. In both the first presidential transition, from George Washington to John Adams, and the most recent transition following Mr. Nixon's resignation, as well as in many others, the importance of this need has been recognized by making some provision for continued access to documents of the outgoing administration.[40] That practice has not, to be sure, been uniform,

[40] When George Washington left office, he employed two men who had served as his secretaries

> to separate from his papers those files which were intended for his successor in office, John Adams, and to pack and send the remainder to Mount Vernon. It was later discovered, as the result of a request from Attorney General Charles Lee, that two bundles containing original opinions of the Heads of Departments were still in the possession of the Secretary of State, who had borrowed and failed to return them. He promptly made arrangements for their return.

Index to the George Washington Papers, Library of Congress, Manuscript Division, at vii (1964).

Julian P. Boyd, the editor of the Thomas Jefferson papers, in his Affidavit at 2-3 stated that Jefferson never explained the principle underlying his practice in disposing of papers, but described that practice as follows:

> During his two terms as President, Jefferson was extremely meticulous in depositing in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of the public business or being in any sense official in nature. As a result, the vast bulk of records of an official nature generated during Jefferson's presidency are still to be found in the various departmental record groups in the National Archives.

There are several more recent examples of such a practice. After Franklin Roosevelt's death during World War II,

but that nonuniformity may only reinforce the validity and cogency of a congressional view that records of past executive policymaking ought to be preserved so that future administrations can have ready access to them and a desire to institutionalize arrangements conducive to such a practice. There are numerous examples in the record of incumbent administrations having to apply to presidential libraries for permission to examine records of past government actions that relate to current gov-

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it was clearly essential that materials relating to the war effort remain available to the Truman administration. Pursuant to an agreement between Truman and the executors of Roosevelt's estate, the so-called Map Room papers remained in government custody until the Executive no longer had need for them. Affidavit of William R. Emerson, July 22, 1975, exh. C. When President Johnson suddenly assumed office after the assassination of John F. Kennedy, "it was deemed necessary to retain most of President Kennedy's files at the White House for the time being for use by the Staff." Affidavit of William J. Hopkins at 12. More than 18 months after that transition, the executors of President Kennedy's estate expressly indicated that the Archivist of the United States was authorized to make available to President Johnson any materials needed by him in the performance of his duties as President. Affidavit of Richard A. Jacobs, exh. H. Most recently, when Mr. Nixon left office, all originals of virtually all papers, *see* note 1 *supra*, were boxed for shipment, but staff members were to make copies of documents necessary for continuity in government. Nesbitt Deposition at 40. *See also* Nixon Deposition at 130, 134-36 (conceding that various materials may aid continuity in government, but suggesting that a former President must control them to preserve executive confidentiality). *See also* note 53 *infra*.

It is no doubt true that the need for retention of records is most critical during wartime or after a sudden change in administration. That does not indicate, however, that the need is not great in ordinary times.

ernment problems [41]—permission that has not uniformly been granted.[42] We agree with the assessment of this state of affairs made by Arthur Schlesinger, Jr.:

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[41] Evidence in the record establishes that numerous requests have been made by officials of incumbent administrations for access to materials housed in presidential libraries. It is uncertain and perhaps doubtful that the record reflects all requests, formal or informal, that have been made, nor it is always clear whether particular requests were pursued and ultimately fulfilled. Although the preponderance of requests have related to foreign affairs, a not insignificant number have involved domestic policy. The requests made have related to such diverse topics as ongoing policymaking in the field of foreign affairs; preparation of historical accounts by the State Department, CIA, military, and Atomic Energy Commission; a New Deal dam project; pending litigation involving the Federal Government; and the funding of the Kennedy Center.

For the relevant evidence, *see* Affidavit of John S. D. Eisenhower at 7-8; Affidavit of Daniel J. Reed, exh. D, at 79; Affidavit of John Stewart at 2-3; Deposition of Jack Nesbitt at 72; Letter of July 23, 1975 from William R. Emerson, Director of the Roosevelt Library, to R. Stan Mortenson, at 2; Affidavit of William R. Emerson, July 22, 1975, at 3 & exhs. D, E, G, H, I, K, L, M, N, O, P, T, U; Letter of July 18, 1975 from John E. Wickham, Director of the Eisenhower Library, to R. Stan Mortenson, at 1. *See also* Affidavit of Jeanne W. Davis at 5-6.

There have already been a number of requests for materials from the Nixon administration. *See* Letter of July 29, 1975 from R. Stan Mortenson to Andrew Krulwich, and attachments thereto.

[42] The only incident of this nature plainly established in the record occurred during President Kennedy's administration. One of the issues in American foreign relations at that time was providing assurances to France that the United States' nuclear deterrent was reliable. In expressing doubts about such reliability, the French Government alleged that during the 1956 Suez Crisis the United States had failed to

> No President should ever have to apply to the library of one of his predecessors, as President Kennedy had to apply to the Eisenhower Library in 1962 to find the memorandum of a presidential conversation with an English Prime Minister, or as President Johnson had to apply to the same library in 1967 for presidential correspondence with a Prime Minister of Israel.

Schlesinger, *supra* note 14, at 180. Precedent as old as Justice Story's opinion in *Folsom v. Marsh*, 9 F. Cas. 342, 347 (No. 4901) (C.C.D. Mass. 1841), and as recent as the 1974 Opinion of the Attorney General on ownership of presidential papers, 43 OP. ATT'Y GEN. No. 1 (Sept. 6, 1974), at 5-7, has recognized the importance of this need, as did Congress with respect to executive records generally, rather than presidential materials specifically, when it enacted the Federal Records Act of 1950, 64 Stat. 583, *codified in* 44 U.S.C. §§ 2101 *et seq.* (1970). We believe Congress could legitimately believe it impor-

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support France and Britain after the Soviet Union had threatened a nuclear attack if the Suez operation continued. C. Douglas Dillon, Ambassador to France in 1956 and later Secretary of the Treasury, contended that the French allegations were inaccurate and sought to find a telegram he sent to Washington in 1956 indicating that he had provided firm assurances to France. After failing to locate it in State Department files, officials of the Kennedy administration requested John S. D. Eisenhower—the former President's son and the individual in charge of his papers—to search for the telegram in question. Mr. Eisenhower had doubts that that request truly involved national security, *see* Affidavit of John S. D. Eisenhower, exh. B, and responded that the request would be honored only if made personally by Secretary of Defense McNamara to President Eisenhower. McNamara decided, in light of the need to preserve cordial relations with President Eisenhower and to minimize the number of requests for materials, not to pursue the matter and to rely merely upon Mr. Dillon's recollection. Affidavit of Paul H. Nitze, at 2-6. *Cf.* pp. 95-96 & note 68 *infra*.

tant to legislate, as it did, to ensure that this need is served by a regularized and certain procedure.[43]

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[43] Plaintiff asserts a number of challenges to the legitimacy or importance of this interest as a basis for upholding the Act, all of which we believe are without merit. First, he argues that this purpose was not considered by Congress and is nothing more than a *post hoc* rationalization. Plaintiff's Reply Brief at 7. Even were we to assume that a court is foreclosed from considering purposes mentioned in litigants' briefs but not in the legislative record, an issue about which we express no opinion, *see generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 43-47 (1972), that would be beside the point, as there is ample evidence in the legislative record, cited above in text, that this purpose was considered in Congress and the purpose is apparent from the face of the Act, *see* § 102(d).

Second, Mr. Nixon states that the representative of President Ford who negotiated the Nixon-Sampson agreement evidently felt that it satisfied the Executive's needs. Plaintiff's Reply Brief at 7. We do not believe that approval by a brand new Chief Executive of an agreement negotiated in some haste and, as plaintiff himself notes, *see* p. 98 *infra*, in a time of some turbulence, necessarily represents the considered judgment of the executive branch, especially since such a contention is to some extent inconsistent with President Ford's having signed the Act. In any event, we are certain that Congress is not bound to accept as conclusive whatever view of the needs of executive continuity a document such as the Nixon-Sampson agreement might be thought to imply.

Plaintiff also asserts at p. 9 of the Reply Brief that no refusal by Mr. Nixon to permit access to documents for national security purposes has been presented. The short answer to this argument is that Congress need not wait until executive needs have not been fulfilled in order to legislate on important matters of public administration; surely "preventive medicine" is a legitimate legislative technique. Mr. Nixon also asserts that the Act is overbroad with respect to this purpose. However, in light of the manner in which all of the documents are mingled, *see* pp. 62-63 *infra*, comprehensive

Although these two interests strike us as the most significant, there are three other interests of considerable force that are served by this Act. First, the events of the past years, and the widespread allegations surrounding them, might properly be thought by Congress to have undermined the nation's faith in its political processes and its confidence in its future. *See* 120 CONG. REC. S 18258 (daily ed. Oct. 3, 1974) (remarks of Sen. Cranston); *id.* at S 18260 (remarks of Sen. Ribicoff). To the extent that short-term public access is consistent with preservation of constitutional rights and privileges, a full airing of these events by disclosure of materials whose contents are peculiarly informative is surely a legitimate congressional pursuit. *See* S. REP. NO. 93-1181, 93d Cong., 2d Sess., at 3, 4, 6 (1974); H.R. REP. NO. 93-1507, 93d Cong., 2d Sess., at 2, 8; 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18233, 18235 (daily ed. Oct. 3, 1974); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas); *id.* at H 11211 (remarks of Rep. McKinney). *See also* section 104(a) of the Act. And here too, disclosure serves values at the core of the First Amendment. *See* pp. 50-52 and note 39 *supra*.[44]

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review would be necessary to ensure that all materials relating to this purpose could be segregated. Although the factors listed under section 104(a) of the Act do suggest that the regulations promulgated thereunder may be directed to other purposes as well, we believe those purposes to be entirely valid. And legislation is not overbroad when there is no narrower way to serve all of the various purposes to which it is directed. *Cf.* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972). With respect to the entire range of purposes involved—especially the interest in preserving a complete and accurate historical record—the Act on its face is not overbroad. *See* pp. 62-63 *infra*.

[44] Although Mr. Nixon appears at one point to concede the legitimacy of this interest, *see* Reply Brief at 16-17, elsewhere he suggests it is illegitimate, *see id.* at 69-70 and n.42. For reasons outlined in note 16 *supra*, we believe that the latter position must be rejected.

The documents and tape recordings are important to the legislative branch because they enable Congress to understand how our political processes have operated, a necessary predicate to informed consideration of the appropriateness of legislative reform and changes in institutional design. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 3, 4 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 2, 3, 8 (1974); 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18235 (daily ed. Oct. 3, 1974). The congressional power to investigate, although limited to areas in which Congress possesses legislative authority, *Eastland v. United States Servicemen's Fund*, *supra*, at 504 n.15, is both broad and integral to the legislative process, *id.* at 504-05 and cases cited. Information from both recent and more distant years may be essential to guide legislative decisionmaking,[45] and therefore, by preserving the Nixon presidential materials, the Act serves to aid the legislative process.[46]

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[45] The record provides examples of such requests made by members of Congress or congressional committees to presidential libraries to use materials, requests that have often been honored. *See* Affidavit of Harry J. Middleton at 4; Affidavit of William R. Emerson, July 22, 1975, exhs. S, U; Affidavit of Daniel J. Reed at 3; Affidavit of John Stewart at 2. A number of requests have already been made by Congress to obtain from Mr. Nixon materials claimed to be relevant to matters of congressional concern. *See* Affidavit of Raymond G. Larroca at 4-5.

[46] Plaintiff at 182-85 of his brief suggests that both this interest and that in informing the public cannot be considered to be especially important in light of the court of appeals' decision in Senate Select Comm. v. Nixon, *supra*. That decision held that the need asserted by the Select Committee was insufficiently compelling to outweigh the need to preserve ex-

Finally, these materials are important to the Judiciary in the event that they might shed light upon material issues in civil or criminal litigation. *See* S. REP. No. 93-1181, 93d Cong., 2d Sess., at 1, 4, 6 (1974); H.R. REP. No. 93-1507, 93d Cong., 2d Sess., at 2, 3, 8 (1974); 120

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ecutive confidentiality. Although there is some language in the opinion that might be thought to support plaintiff's contention, *see* 498 F.2d at 732, we believe plaintiff's reading is overly broad and therefore misleading. The court repeatedly emphasized that its holding was peculiarly dependent upon the special circumstances of that case. *See id.* at 731 ("[p]articularly in light of events that have occurred since this litigation was begun"); *id.* at 732 ("In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power. . . ."); *id.* at 733 (emphasizing "the peculiar circumstances of this case"). The committee's argument that it had a vital need for the material sought was undercut by three important factors: first, the fact that much of the material had, during the pendency of the suit, been voluntarily released by Mr. Nixon, *see id.* at 732-33; second, the fact that the House Judiciary Committee, whose functions substantially overlapped with the Select Committee, had in its possession copies of each of the tapes subpoenaed by the Select Committee, making the need merely cumulative, *see id.*; and third, the fact that disclosure was opposed by the Special Prosecutor because it might prejudice pending criminal prosecutions, *see* Senate Select Comm. v. Nixon, 370 F. Supp. 521, 522-23 (D.D.C. 1974). Moreover, the attempt to obtain materials in that case was at the behest of a single committee of one House of Congress rather than under an Act approved by both Houses and signed and supported by the President. *See* Freund, *supra* note 27, at 38; Sofaer, *supra*, at 292 (by implication); *cf.* O'Brien v. Brown, 409 U.S. 1, 5 (1972) (per curiam). Additionally, the *Senate Select Committee* court did not consider the possibility of permanent destruction or unavailability of the historical record in reaching its decision. Finally, we note that the infringement of executive confidentiality caused by screening materials under this Act is, for reasons already discussed, much more limited than release of materials to a congressional committee whose design was in part to inform the public.

CONG. REC. S 16870-71 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); *id.* at S 18233 (daily ed. Oct. 3, 1974); *id.* at H 11207 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas). *See also* sections 102(b), 104(a)(2) of the Act. Plaintiff has reminded us that, under the Nixon-Sampson agreement, all materials would be available to judicial process for a period of three years, and the tape recordings for five. *See* Reply Brief at 2-4; pp. 10-12 *supra*. And we note in addition that the Special Prosecutor has indicated that he has fulfilled his need for the materials in the investigations he has undertaken. *See* pp. 16-18 & note 11 *supra*. These facts do not, however, dispose of the genuine need of the Judiciary. In the first place, the agreement was only one between Mr. Nixon and the executive branch, and Congress might have been concerned that it was not immune from amendment. More important, there was no assurance that the need for evidentiary material in litigation would no longer exist after the three-year period. New needs in existing cases might arise; new actions might be brought; in the case of criminal prosecutions, retrials might take place if convictions were reversed upon appeal. The enormous volume of litigation related to Watergate or involving Mr. Nixon, civil and criminal, that has taken place or is now pending, *see* WSPF *Report* at 155-68; Affidavit of Raymond G. Larroca at 6-8,[47] indicates the importance of this interest and belies any notion that three years is a magic period after which the needs of litigants for materials covered by the Act will suddenly disappear.[48]

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[47] The record also indicates that on at least two occasions, the Truman administration obtained materials from the Roosevelt Library for use in civil litigation that arose seven to eight years after the materials were prepared. Affidavit of William R. Emerson, July 22, 1975, exhs. E, K.

[48] Mr. Nixon asserts in his Reply Brief at 5-7 that this congressional purpose is nothing more than an attempt to strip him of the privileges and defenses he might assert were legal

Plaintiff alleges that the Act is overbroad with respect to various of these purposes. We do not believe this to be the case. The Act authorizes retention by the government of only those materials that in some manner have historical significance. *See* sections 101(b)(1), 104(a)(7); note 6 *supra*. It may be true that some of the materials to be retained may never be needed by any historian, member of the public, or branch of government. However, adequate foresight does not exist to permit anyone today to determine what materials may acquire importance, in relation to the congressional objectives, over time. Virtually any item might be needed by a historian, depending upon what subjects seem fit to study some years from now. To a lesser degree, the same point can be made as respects any of the other purposes. Especially insofar as Congress may have wished to establish a practice conducive to widespread use of these materials for all purposes, the retentions cannot be thought to be overbroad.

Nor does it strike us that Congress failed to employ the most narrow means available to screen materials effectively. It is true that archivists will, in the course of reviewing materials, be required to review both (1) materials outside the coverage of the Act and which are plainly plaintiff's private property—for example, various pre-presidential materials of Mr. Nixon's, *see* Nixon Affi-

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process directed to materials in his control. Although we do not need to reach any questions of use of materials after processing has taken place, we do note that Mr. Nixon's suggestion flies directly in the face of section 102(b) of the Act, expressly reserving his rights, defenses and privileges as against legal process, as well as the more general considerations outlined in Part II *supra*. Moreover, at least as respects the privilege protecting executive confidentiality, it is clear that such objections to process, even if constitutionally-based, may be overridden where the need is sufficiently great. *See* United States v. Nixon, 418 U.S. at 703-14; note 50 *infra*.

davit at 2, and (2) materials which, regardless of the state of title, may contain confidential or private communications about a wide range of matters. But those intrusions are inevitable given the manner in which the materials are intermingled. *See* Affidavit of Thomas R. Wolf at 3. In the White House Central Files, *see* note 1 *supra*, no attempt was made to segregate personal, political, or official documents. Affidavit of William J. Hopkins at 8. Moreover, materials from staff employees in the White House were gathered in great haste following Mr. Nixon's resignation, and little is known about the contents of many of the boxes in which they are stored. Deposition of Jack Nesbitt at 42-46; Affidavit of William F. Matthews at 6. Even individual documents may contain both communications that are related to governmental duties, are of great historical interest, and are neither private nor confidential, and communications that are extremely private and confidential and of no historical significance. Affidavit of William J. Hopkins at 8. Thus, as a rule, it is necessary to review each document to some extent in order to classify it. Affidavit of Richard A. Jacobs at 8. As for the tape recordings, they shift suddenly and unpredictably among various subjects of conversation, so that again the comprehensive review necessary to identify conversations related to legislative objectives necessarily will intrude on conversations that may be private, confidential, or wholly unrelated to those objectives. Affidavit of Raymond G. Larroca at 1-4. Because the intermingled state of the materials allows no effective manner of identifying and classifying the materials other than the scheme broadly contemplated under this Act, we find that the Act is not overbroad.[49] We con-

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[49] Regardless of where title in the materials is thought to lie, Congress plainly has authority to pursue these purposes. Insofar as the materials are Mr. Nixon's personal property, they are subject to condemnation under the eminent domain power, and Congress has provided in § 105(c) compensation

clude, therefore, that the great importance of congressional purposes here far outweighs the need to prevent

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for any taking of private property that may be effected. Although such condemnation must qualify as a public use, the scope of legislative power is very broad:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Berman v. Parker, 348 U.S. 26, 32 (1954); *accord,* United States, *ex rel.* TVA v. Welch, 327 U.S. 546, 551-52 (1946). In United States v. Gettysburg Elec. Ry., 160 U.S. 668, 682-83 (1896), the Supreme Court, in upholding condemnation of land for the purpose of studying the historic Gettysburg battle, indicated that the power to condemn for historical purposes is not to be narrowly construed:

> Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. . . .
>
> No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain.

Accord, Roe v. Kansas, 278 U.S. 191, 193 (1929) ("there is no basis for doubting the power of the State to condemn places of unusual historical interest for the use and benefit of the public"); Barnidge v. United States, 101 F.2d 295, 298-99 (8th Cir. 1939) ("Primarily, the right to determine the purpose to be a public one is in Congress"; "We have no doubt of the power of the United States, under the Constitution, to acquire by eminent domain, or otherwise, sites of national historic significance. . . ."); (United States v. Certain Parcels of Land in City of Philadelphia, Pa., 99 F. Supp. 714, 717 (E.D. Pa. 1951), *aff'd,* 215 F.2d 140 (3d Cir. 1954). The discussion

the very limited intrusion on whatever interest—if any—in presidential confidentiality Mr. Nixon may assert, and

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in text of the various historical purposes served by this Act should make it crystal clear that Congress was well within the scope of its power to condemn for historical purposes any property thought to be Mr. Nixon's.

Plaintiff alleges that the power of eminent domain cannot be employed to condemn personal papers rather than real property. However, he provides neither authority for such a contention nor any reason why a distinction between papers and real property should be of constitutional dimension. And it is clearly established that the power of eminent domain extends both to intangibles, *see* Cincinnati v. Louisville & Nashville R.R. Co., 223 U.S. 390, 400 (1912), and to the product of intellectual activity, *see* Interdent Corp. v. United States, 488 F.2d 1011 (Ct. Cl. 1973) (per curiam). To be sure, prior cases may not have involved condemnation of property implicating privacy interests, but the eminent domain power does not fail whenever privacy concerns arise. Instead, that power remains, subject—like all other sources of congressional power—to the limitation that it must be exercised in a manner consistent with the Bill of Rights. *See* Berman v. Parker, *supra.* The thrust of plaintiff's challenge to any use of eminent domain power seems to consist of allegations that the exercise of that power in this case has violated plaintiff's personal rights, rather than that the purposes whose promotion Congress sought lie outside the legislature's constitutional authority. The parts of this opinion that follow consider whether the Act infringes plaintiff's individual rights.

Insofar as the materials at issue are thought to be the property of the Government rather than that of plaintiff, the source of congressional authority would be Art. IV, sec. 3, which provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

Legislation such as the Freedom of Information Act, 5 U.S.C. § 552 (1970), *see* note 16 *supra,* and the Federal Records Act, 44 U.S.C. §§ 2101 *et seq.* (1970), whose constitutionally seems

hence find his separation of powers and presidential privilege points to be without merit.[50]

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unquestioned, is premised upon this grant of power. Cases construing this section of Article IV have adopted a broad interpretation of Congress' power thereunder. *See* Alabama v. Texas, 347 U.S. 272, 277 (1954) ("The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of Nation."); United States v. Gratiot, 39 U.S. (14 Pet.) 526, 538 (1840) (the question of how to dispose of government property "must be left to the discretion of congress"). Plaintiff makes no attempt to challenge this well-established power, and we believe the Act falls well within this congressional authority insofar as it might regulate public property.

[50] Mr. Nixon argues in his Reply Brief at 44-48 that the presumptive privilege recognized in United States v. Nixon requires persons seeking to overcome a claim of privilege to make a strong showing of need—stronger than mere relevance—to rebut the presumption before even *in camera* screening, or in this case archival processing, can take place. There is support for this view in the language of that decision, *see* 418 U.S. at 713, *quoting* United States v. Burr, 25 F. Cas. 30, 192 (No. 14,692d) (C.C.D. Va. 1807) (Special Prosecutor is required to demonstrate that material under subpoena was "'essential to the justice of the [pending criminal] case,'"); *id.* at 713-14 (suggesting a need for a sufficient showing to rebut the presumptive privilege), in other decisions, *see* Senate Select Comm. v. Nixon, *supra*, 498 F.2d at 729-30; Nixon v. Sirica, *supra*, 487 F.2d at 705-06, 717, and in the opinions of commentators, *see* Freund, *supra* note 27 at 31; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 61 (1974). On the other hand, a similarly strong argument, based on the same kinds of sources, can be made for the proposition that mere relevance is all that is required to rebut the presumptive privilege. *See* United States v. Nixon, *supra*, at 709 ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . The very integrity of the judicial system . . . depend[s] on full disclosure of all the facts, within the framework of the rules of evidence."); *id.* at 714 ("Statements that meet the test of

IV. CLAIMS RELATING TO PRIVACY

The most troublesome challenge that plaintiff raises is that the Act violates his constitutionally based right of privacy. Although his brief bifurcates this claim, presenting both a right of privacy and a search and seizure claim, we do not believe that the two are genuinely distinct. The argument setting forth the right to privacy claim relies heavily upon search and seizure precedents, not surprisingly as, in our view, the Fourth Amendment provides by far the clearest and best-established source

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admissibility and relevance must be isolated; all other material must be excised."); *id.* at 712-13:

> . . . The allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . . The President's broad interest in confidentiality will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

See also Sun Oil Co. v. United States, *supra*, 514 F.2d at 1024-25; Smith v. Schlesinger, 513 F.2d 462, 477 & n.52 (D.C. Cir. 1975); Cox, *supra*, at 1414; Ratner, *supra*, at 96-98.

We need not, we believe, indicate our agreement with one or the other of these interpretations. For, in our view, either a former President may not validly claim executive privilege at all, or if he may do so, his claim is entitled to much less weight than that accorded a claim asserted by an incumbent President. It follows that a claim of privilege by a former President may be overcome by a showing less strong than that needed when the incumbent raises the claim. Since we believe the materials are manifestly relevant to important government interests asserted here, and since here—as was not true in United States v. Nixon—confidential examination of materials will not necessarily have as its purpose identification of materials to be turned over immediately to other government officials and perhaps to be used at public criminal trials, we do not believe that recognition of a presumptive privilege prevents screening by government archivists.

of constitutional protection of privacy.[51] Moreover, the key in adjudicating a search and seizure claim is whether an individual can demonstrate an invasion of his "reasonable expectation of privacy." *E.g., Katz v. United States*, 389 U.S. 347, 351-53 (1967); *id.* at 360-61 (Harlan, J., concurring). The extent to which there is such an invasion, and the justification for it, must be the focus in adjudicating both claims, and they may be discussed jointly.

We reiterate at the outset that we concern ourselves only with the constitutional questions raised with respect to the process by which the screening will be performed. Since any claim by plaintiff that his privacy will be invaded by public access to private materials must be considered premature when it must actually be directed to

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[51] Insofar as Mr. Nixon's privacy claim rests upon the privacy in political association protected by the First Amendment, it is discussed separately in the next part of this opinion. Insofar as Mr. Nixon suggests that he has a general right of privacy different from and broader than the protection of the Fourth Amendment, we must reject that argument. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court discussed the various sources of constitutional protection of privacy. It noted that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion" and that other provisions of the Constitution, such as the First Amendment, also provide specific protection against particular government actions in some way involving personal privacy. But the Court noted that a "general right to privacy" finds support not in the Constitution but only, if at all, in the law of particular states. *Id.* at 350-51 & n.5. The only decision plaintiff cites to suggest otherwise is Stanley v. Georgia, 394 U.S. 557 (1969). Although there is some broad language in *Stanley* that could be read to suggest a general right of privacy, *see id.* at 564, the decision in that case rested on the special conjunction of privacy and free speech challenges to a conviction for the possession in a private home of obscene matter, and emphasized the traditional First Amendment aspects of the case, *see id.* at 559-64, 565-67.

the regulations once they become effective, we need not consider how the materials will be treated after they are reviewed. *See* pp. 18-28 *supra*.[52]

It is difficult to know precisely how many of the 42 million pages of documents and what proportion of the 880 tape recordings implicate plaintiff's privacy, but the ratio appears to be quite small in both cases. As far as the documents go, if plaintiff himself saw no more than 200,000, *see* p. 40 *supra*, we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private. Included within the materials falling under the Act, for example, would be internal memoranda from an executive agency which, after review by numerous individuals in that agency, were transmitted to a member of the White House staff but never to Mr. Nixon, *see* note 1 *supra;* the attenuated connection of such material to Mr. Nixon and the exposure to many others makes any privacy claim in such materials on his part impossible to sustain. Wherever bare legal title may be thought to

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[52] The Proposed Regulations, *supra* note 13, would provide not insignificant protection of personal privacy. First, any individual would have the opportunity to assert any legal or constitutional right or privilege which would prevent or limit public access, and have an administrative determination, with ultimate access to judicial review, as to the validity of the claim. § 105-63.401-1(a), (c). Second, with respect to materials of historical significance unrelated to abuses of governmental power, access will be restricted to materials whose release would "constitute a clearly unwarranted invasion of personal privacy or result in the defamation of a living person. . . ." § 105-63.402-2(b)(2). With respect to materials that are related to abuses of government power, access restrictions will be imposed in the same circumstances as above, subject, however, to the proviso that no restrictions shall be imposed on access to personal information "essential to an understanding of the abuse of governmental power." § 105-63.402-1(b).

reside in respect of the papers here in issue, it seems clear that the great bulk of them—those relating to the conduct by Mr. Nixon of his duties as President and a political leader of the nation—are quite unlike private property in light of the great public interest attaching to them. It is of course black letter law that the Fourth Amendment protects privacy and not property, *e.g.*, *Cardwell v. Lewis*, 417 U.S. 583, 589 (1974) (plurality opinion); *Warden v. Hayden*, 387 U.S. 294, 304 (1967), but in this case the two may not be wholly distinct concepts. Rather, the public trust in the bulk of these papers [53]—

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[53] When we speak of a public trust, we mean the consistent recognition that such materials are infused with a public interest for all of the reasons outlined above, *see* pp. 48-61 *supra*, and that if the President is to exercise control over their disposition, he does so as a "public trustee," *cf.* Freund, *supra* note 27, at 21.

> Franklin Roosevelt . . . inaugurated the idea of depositing the White House files in a special library set up under the National Archives for that purpose. This new practice . . . clearly implied an obligation [on the part of the President to give his papers to the nation] and an overriding public interest in the preservation and orderly opening of the White House files.

Schlesinger, *supra* note 14, at 178. President Eisenhower's son John, who had substantial responsibility for the disposition of his father's papers, expressed much the same sentiment, indicating that his father "felt that the presidential papers ultimately belong to the public . . . ." *Hearings on H.R. 16902 before the Subcomm. on Printing of the House Comm. on House Administration*, 93d Cong. 2d Sess., at 77 (1974). President Johnson shared that view:

> It has long been my belief that the papers and other historical materials of a President constitute a vital part of our Nation's historical heritage and that such papers and materials should be permanently preserved and made available for scholarly research and study.

Affidavit of Richard A. Jacobs, exh. I. *See also* p. 50 *supra* (statement of Harry S. Truman); Letter of January 19, 1953

be it denominated as a property interest or otherwise—itself undercuts the reasonableness and force of any privacy expectation that Mr. Nixon would assert in the bulk of the papers. As for the tape recordings, we have no estimate by Mr. Nixon of what percentage of the conversations implicate Mr. Nixon's privacy rights. But recordings made in the offices provided for use by the President must surely relate primarily to the conduct of the presidency. Moreover, insofar as Mr. Nixon has made public certain portions of the tape recordings, *see* p. 41 *supra* he can no longer claim a privacy right in them. *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *United States v. Katz*, *supra*, at 351.

Among all of the papers and tape recordings falling within the Act, however, are some papers and materials containing extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files. Nixon Affidavit at 8-12. Segregating those that are private from those that are not private requires rather comprehensive screening, and archivists entrusted with that duty will be required to read or listen to private communications. *See* pp. 62-63 *supra*. Although the fact that private materials comprise only a small fraction of the total may be relevant to the Act's overall reasonableness, it in no way indicates that those private materials do not fully implicate privacy concerns.

This screening process would raise little, if any, constitutional difficulty were the Act wholly prospective in operation. A President who knew he would be subject to such a statute would have the opportunity to file

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from Jess Larson, Administrator of GSA, to Harry S. Truman, *reprinted* as exh. C to Affidavit of Richard A. Jacobs ("I have long been aware that you consider the possession of these papers a public trust . . . .").

materials to prevent commingling, to prevent retention of some materials, or to take other steps to protect his privacy. If commingling of private and nonprivate materials persisted, it would be difficult to claim that an objection, based on privacy grounds, to archival processing necessary to segregate materials would be reasonable. In this case, however, Congress acted retroactively with respect to Mr. Nixon. Moreover, it acted against a historical background of *de facto* presidential control over the disposition of materials. In the era when presidential libraries have been established by former Presidents, it has been the consistent practice for those Presidents to remove from the White House virtually all the files: the Central Files and all of its component parts except for the relatively insignificant precedent file, *see* note 1 *supra*; any files maintained by the President or his secretary; the non-institutional files of the National Security Council, *see* note 1 *supra*; Affidavit of Jeanne W. Davis at 3; and materials from the files of staff members except those relating to personal activities, Affidavit of William F. Hopkins at 6; Affidavit of John S. D. Eisenhower at 5; Deposition of Jack Nesbitt at 69-70. The only files left behind are the precedent file of the Central Files; the card file of the Records Office, *see* note 1 *supra*; and the files of the Administrative Office, *see id.* It was the common assumption of those familiar with this practice that each President would follow it. McDonough, *supra* note 34, at 2-4; Hoxie, *Who Owns Presidential Papers?*, 27 MANUSCRIPTS 6, 10 (1975).

Although every President who has established a presidential library has requested and obtained the assignment of archivists to screen materials, Affidavit of Richard A. Jacobs at 8-9, some of which undoubtedly were private in nature, *see* sources cited note 33 *supra*, these Presidents or their designees have removed some items from the screening process, either by excluding them

from the scope of the deposited materials or by placing them on deposit but forbidding their even being screened. On the whole, such exclusions have involved materials private in nature, often relating to personal and financial aspects of family relations.[54] Moreover, if other pri-

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[54] The record does not clearly indicate whether President Hoover actually excluded any materials from the scope of his gift, although his offer to deposit materials in a presidential library reserved the right to exclude from the deposit personal and private materials. Affidavit of Richard A. Jacobs, exh. A. President Roosevelt indicated his intention to go through his papers and select those that were to be retained by his family. Because of his death, this function was to be performed instead by designated individuals. *See* Affidavit of William R. Emerson, July 22, 1975, exh. A. Roosevelt's personal secretary "worked with" his personal file for several months before it was turned over to the library, Affidavit of William J. Hopkins at 9, and the record is uncertain as to how many documents she may have removed. A number of personal documents that were deemed to be personal family correspondence were turned over to the Roosevelt family by the Library in 1948, later returned to the Library in 1954-55, and have been on loan to the family since then; it is unclear to what extent this correspondence was reviewed by library personnel. Letter of July 23, 1975 from William R. Emerson, Director of the Roosevelt Library, to R. Stan Mortenson, at 3.

President Truman withheld from deposit the personal file maintained in the White House by his personal secretary; upon his death in 1974, this file was turned over to the library, although the terms of the will excluded a small number of items determined by the executors of his will to pertain to the business or personal affairs of the Truman family. Letter of July 23, 1975 from Benedict K. Zobrist, Director of the Truman Library, to R. Stan Mortenson, at 1, 2-3; *Whistle Stop: The Harry S. Truman Library Institute Newsletter*, Vol. 3, No. 2, Spring, 1975, at 3. President Eisenhower's offer to deposit his presidential materials excluded those materials determined by him or his representative to be personal or private, Affidavit of Richard A. Jacobs, exh. F, and President Eisenhower reviewed materials in files whose possession he retained after leaving office, Affidavit of John

vate materials were not excluded from review in the past, that might demonstrate little more than that past Presidents chose not to protect fully their privacy rights, a choice not necessarily binding upon Mr. Nixon. Regardless of the state of title to the materials in question—an issue we do not reach [55]—we believe that the manner in which such materials have been treated by past Presidents, together with the legislative approval of such treatment, *see* V. Treacy, *Ownership of Presidential Papers*, Sept. 24, 1974 (Library of Cong., Cong. Rsch. Serv.); 43 OP. ATT'Y GEN. No. 1, at 3-5 (Sept. 6, 1974), gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his

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S. D. Eisenhower at 6. The presidential materials of John F. Kennedy deposited with GSA did not include certain objects and documents relating to his private affairs. Letter of July 23, 1975 from Dan H. Fenn, Jr., Director of the Kennedy Library, to R. Stan Mortenson, at 3. There are also 68 dictabelts of telephone conversations, and 125 magnetic tapes of meetings involving President Kennedy, which are or have been physically stored in the Kennedy Library but have not yet been turned over to the library or reviewed by archivists. Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson at 5. President Johnson's offer of deposit excluded items which he determined to be of special or private interest to personal or family affairs. Affidavit of Richard A. Jacobs, exh. I.

[55] We need not reach this issue because we believe that plaintiff's reasonable expectation of privacy is adequately established by the practice of *de facto* control of presidential materials by former Presidents. That expectation does not depend upon whatever implications, if any, that practice has for the question of ownership, nor would plaintiff's Fourth (or First) Amendment claim be stronger were we to hold that the materials at issue were his property.

We have already indicated that the ownership of the papers does not affect the existence of congressional authority to regulate their disposition. *See* note 49 *supra*.

consent. *See* 120 CONG. REC. S 16871 (daily ed. Sept. 18, 1974) (remarks of Sen. Nelson); Nixon Affidavit at 17, 19. Whether this intrusion on privacy interests is called just that or is considered a search and seizure, it constitutes the central issue in adjudicating plaintiff's privacy claim.

We do not believe the Fourth Amendment's warrant requirement is applicable to this case,[56] and hence the

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[56] None of the parties has given much consideration to this aspect of plaintiff's search and seizure claim, an inattention that we believe reflects the inapplicability of that requirement to this case. We have difficulty fitting this case within the normal rule that, absent a recognized exception, a warrant must be obtained regardless of the reasonableness of the search. That difficulty may be due in part to the consideration and approval by Congress of the very search contemplated under the Act. It may also be attributable to the judicial safeguards available to Mr. Nixon prior to the infringement of protected interests. The materials in question were in government custody pursuant to the Nixon-Sampson agreement before this Act was passed. Although that custody has not adhered to the agreement's terms, the deviations are attributable to court orders issued in the consolidated cases, before this suit was brought or the Act was passed. *See* note 10 *supra*. Plaintiff in this proceeding has the opportunity to challenge the Act's facial validity before he has been harmed in any way by the Act's operation. *See* also note 23 *supra*. In these special circumstances, we have trouble finding the warrant requirement to be applicable.

Even assuming its applicability, we have no difficulty upholding the legality of a "warrantless search" in this case. In a series of cases involving so-called administrative searches, the Supreme Court has not uniformly required warrants to be obtained. *See* United States v. Biswell, 406 U.S. 311, 316-17 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Indeed, in the only case involving a statutory scheme in which searches did not help to enforce criminal laws—a characteristic that the regulations may emulate, *but see* note 61 *infra* or, if necessary, be required by judicial review to emulate—the Supreme Court held that a warrant was

only touchstone of the legality of a search and seizure is its reasonableness. *See, e.g., United States v. United*

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unnecessary. Wyman v. James, 400 U.S. 309 (1971). The *Wyman* court distinguished earlier decisions requiring warrants for housing inspection searches, *see* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967), on the ground that in those cases criminal sanctions were available—either if an individual refused to consent to a search or if a search revealed housing code violations that were not properly remedied. 400 U.S. at 324-25; *see* Camara v. Municipal Court, *supra*, at 530-31, 533.

A distinction between civil and criminal searches finds support not only in decided cases but also in the Fourth Amendment's language and values. The amendment contains two clauses, one prohibiting unreasonable searches and seizures and one requiring that warrants be issued only upon probable cause. Reconciliation of the two clauses has proved to be a central problem in the development of Fourth Amendment law. *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring); *id.* at 510-12 (White, J., dissenting); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-44 (1969); White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 172-73, and sources cited. The distinction outlined above would achieve reconciliation by suggesting, as a guide rather than a rule, that a particularized showing of probable cause must ordinarily be made in cases involving criminal investigation (the warrant clause), but a more generalized showing of reasonableness, without a warrant, may suffice for noncriminal cases (the reasonableness clause). *Id.* at 178-80.

The distinction would also find support in the function that a magistrate can serve. In a criminal case, the magistrate can evaluate the particular facts to determine the probability that an offense has been commited and evidence thereof may be found at a specified location—a determination limited in scope and not in any way alien to the judicial function. *See* LaFave, *Administrative Searches and the Fourth Amendment*, 1967 SUP. CT. REV. 1, 23-24. Where searches further broad legislative policies by their cumulative contribution to those ends, each being of little value but many being necessary to promote such ends, the competence of magistrates in reviewing

States District Court, 407 U.S. 297, 309 (1972); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal*

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such judgments is surely open to question. *Cf., e.g.*, Cox, *supra*, at 1429; Freund, *supra* note 27, at 38; Sofaer, *supra*, at 292-94. Here the various purposes subsumed under the rubric of preservation of the historical record of the Nixon presidency can be served only by a comprehensive review process designed to preserve the whole record; isolated bits and pieces are of little value except as parts of a larger picture. Determining the review process necessary to further these ends is a judgment legislative in nature, and one of which judicial review is unlikely to be effective.

It is of course true that in *Camara* the Court required a warrant procedure to review such a legislative kind of judgment. But that case is different from this one in several important respects. First, as noted above, there was a genuine possibility that the search would lead to the imposition of criminal sanctions. Second, if the warrant requirement there made any sense, a question open to some doubt, *see* LaFave, *supra*, at 27, it was to "diminish the chance of an inspection 'based on caprice or on personal spite' or as 'a front for the police,'" LaFave, *"Case-by-Case Adjudication" Versus "Standardization Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 153, *quoting* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 271 (1960), *and* Abel v. United States, 362 U.S. 217, 242 (1960). Here, however, where a comprehensive one-time screening process is contemplated, it is difficult to see how even that function could be served. The scope of the intrusion is presently clear in its broadest outline, and will be made clearer by regulation. There is little possibility that government officials will abuse their discretion in the screening as it will be prescribed by the Act, for that discretion, in terms of the scope of the processing, will be quite broad. Nor, for the same reason, would a warrant procedure enforce particularity in the search. Another purpose of the requirement —limiting the possibility of entry by a criminal into private homes under the guise of official authority—is also inapposite. And finally, since regulations promulgated may prohibit use of evidence gained from the screening process, we need not now worry about the possibility of archivists acting as a front for the police. Where searches take place according to prescribed statutory and administrative standards; where those

Court, 387 U.S. 523, 534-39 (1967). There is "no ready test for determining reasonableness other than by bal-

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standards themselves are reasonable; and where a warrant sufficiently flexible to accommodate reasonable intrusions provides protection that is wholly illusory, insistence upon compliance with the warrant requirement in a purely "civil" case would exalt form over substance. *See* United States v. Biswell, *supra*, at 316.

Finally, a distinction between civil and criminal searches finds support in the notion that the Fourth Amendment is directed not simply against invasions of privacy but also against the use in the criminal process of evidence obtained through such abuses. *See* Camara v. Municipal Court, *supra*, at 530-31 (by implication); White, *supra*, at 180. Such a notion is closely related to a value that has long been associated with the exclusionary rule: the preservation of judicial integrity by refusing to sanction illegal police practices by admitting the fruits of such illegality in trial. *See* United States v. Peltier, 95 S. Ct. 2313, 2317-18 (1975); *id.* at 2324-27 (Brennan, J., dissenting); Brown v. Illinois, 95 S. Ct. 2254, 2259 (1975); *id.* at 2264-65 (Powell, J., concurring). Although the importance ascribed to this purpose, as compared with the deterrent purpose, of the exclusionary rule, has varied over time, *see, e.g.*, Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10 (1975); *compare, e.g.*, Calandra v. United States, 414 U.S. 338, 347-48 (1974), *with, e.g., id.* at 355-67 (Brennan, J., dissenting); Elkins v. United States, 364 U.S. 206, 222 (1960); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); *id.* at 470 (Holmes, J., dissenting); Weeks v. United States, 232 U.S. 383, 391-92, 394 (1914), there appears to be little doubt that Fourth Amendment values are invaded more substantially when not only is privacy infringed, but the result of that infringement is the use of the fruits of the illegality at a criminal trial.

We by no means suggest that warrants are never required in civil cases, but rather that in some civil cases the nature of the statutory purpose, and the relation of the magistrate's function to that purpose, make such a requirement inappropriate. When important interests are at stake which could not be furthered without permitting broad searches based on leg-

ancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.; accord, e.g., Terry v. Ohio, supra*, at 21. The problem before us is how to interpret the reasonableness requirement when facing materials which (1) for the most part are not private and are related to congressional purposes, (2) include items that are personal and private and/or unrelated to those purposes, and (3) are impossible to segregate other than by reviewing all of them.

We believe that the precedents upholding the legality of electronic surveillance conducted pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1970), argue forcefully for finding that the Act before us does not unconstitutionally infringe plaintiff's privacy. It is true, of course, that the provisions of Title III govern searches primarily designed to investigate criminal violations, a quite different emphasis from that of this Act; but, as we note below, that difference only strengthens our conclusion that the Act does not violate any privacy rights. Electronic surveillance of wire communications involves interception of conversations (1) some of which are expected to be related to law enforcement, (2) some of which are not, and (3) for which there is no available means to segregate the one from the other except by reviewing them all.[57] Thus, such surveillance, like the

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islative standards rather than a particularized showing, *see* United States v. Biswell, *supra*, at 315-16; when judicial intervention serves no genuine function, *id.* at 316; and when criminal consequences will not flow from the search, then we believe it may be and, in this case, is improper to apply the warrant requirement.

[57] This problem is not unique to electronic surveillance or the screening to be done under this Act; rather, it may exist whenever a search is made for documentary evidence that is intermingled with other material unrelated to the purpose of the search. It is instructive to note that the congressional

processing involved under this Act, necessarily contemplates intrusions into communications that may be both unconnected to legitimate government objectives and intensely private. If that fact alone were thought sufficient to render surveillance unconstitutional, then law enforcement officials would be foreclosed from ever employing that technique. No court has reached such a conclusion. Instead, every one of the ten circuits that have ruled upon the question has upheld the legality of surveillance conducted according the scheme of the Omnibus Act. *Turner v. United States*, No. 73-2740 (9th Cir. July 24, 1975), slip op. at 18-19; *United States v.*

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scheme before us is in some respects very similar to the procedure prescribed by the ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Official Draft, Approved May, 1975) for dealing with intermingled documents. Under the Code, documents that "cannot be searched for or identified without examining the contents of other documents" shall be impounded by the seizing officer. § SS 220.5(2). After a judicial hearing, an order is issued to specify the conditions and limitations upon any search of the documents' contents. § SS 220.5(3). The purpose of this order, as relevant to this case, is to prevent an excessive intrusion on privacy by providing such safeguards as permitting a party to show that certain portions of the seized materials could not contain the items sought, *see* p. 29 & note 22 *supra*, to have counsel present, and to request that a special master rather than police do the searching. § SS 220.5, Note.

Thus under the Code, materials initially are merely seized and taken into custody, as they have been under the Act. More detailed processing awaits consideration in a hearing possibly leading to the imposition of particular limitations, as under the Act processing awaits particularized consideration under the regulations with judicial review available before any further search begins. Processing may be done not by law enforcement officials but by judicially-appointed individuals, just as under the Act screening will be done by skilled, discreet, and professional archival personnel. These similarities reinforce our view that the processing scheme contemplated by the Act is an appropriate and legal one.

Sklaroff, 506 F.2d 837, 840 (5th Cir.) *cert. denied*, 96 S. Ct. 142 (1975); *United States v. Ramsey*, 503 F.2d 524, 526-31 (7th Cir. 1974), *cert. denied*, 420 U.S. 933 (1975); *United States v. Martinez*, 498 F.2d 464, 467-68 (6th Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. James*, 494 F.2d 1007, 1012-13 (D.C. Cir. 1974); *United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *United States v. Bobo*, 477 F.2d 974, 978-82 (4th Cir. 1973), *cert. denied sub. nom. Gray v. United States*, 421 U.S. 909 (1975); *United States v. Cafero*, 473 F.2d 489, 493-501 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974); *United States* v. *Cox*, 462 F.2d 1293, 1302-04 (8th Cir. 1972); *United States v. Cox*, 449 F.2d 679, 683-87 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

Of course, that scheme requires that a variety of standards and procedures be met before surveillance may be employed. Although the parallel is not, of course, perfect, we believe that this Act does not on its face deviate from those standards and procedures in their principal aspects. For example, under the Omnibus Act, surveillance can be conducted to investigate only designated crimes that are serious in nature, 18 U.S.C. § 2516 (1970), and only when normal investigative procedures have failed or would be likely to do so, *id.* § 2518(3)(c). Here, we have a processing scheme without which national interests of overriding importance cannot be served, *see* pp. 48-63 *supra*, and hence, in terms of the seriousness of the need and the inability to employ potentially less restrictive means, the Act conforms to the spirit of the Omnibus Act. The Omnibus Act also requires that the interception of the communication be minimized. 18 U.S.C. § 2518(5); *see, e.g., United States v. Scott*, 516 F.2d 751 (D.C. Cir. 1975); *United States v. James*, *supra*. Although the Act before us does not so require in its statutory provisions, as we indicated above,

see p. 29 *supra*, the scheme under which the materials will be processed could properly follow such a practice, as well as other practices designed to protect Mr. Nixon's privacy to the maximum extent possible. Thus, we believe the question of the Act's facial validity falls within the precedents upholding the constitutionality of Title III.[58]

Furthermore, there are other factors that suggest that any invasion of legitimate expectations of privacy is entirely reasonable. Whether regarded as making the legality of this Act even clearer than the legality of electronic surveillance or as providing an independent line of argument that the Act is valid, we believe these factors indicate that Mr. Nixon's privacy claim cannot be sustained. First, the percentage of documents and conversations in which plaintiff has no reasonable privacy expectation, although it cannot be estimated with precision, appears to be extremely high. A comparison to the Omnibus Act is instructive. If we assume that all 200,000 of the documents Mr. Nixon saw, and no others, implicate his privacy interests (assumptions that may both be somewhat inaccurate, but whose inaccuracies are offsetting, and which on balance do not seem ungenerous to Mr. Nixon's claim), a very large fraction of the 42,000,000 pages of documents would appear to be nonprivate, and it appears that a very high percentage of them would be related to government interests served by the Act. The ratio of conversations on the 880 tape recordings, although less certain and perhaps lower, is most likely also quite high.

[58] It is true that Title III, unlike the Act, also requires adherence to a warrant requirement detailed with some specificity in 18 U.S.C. § 2518 (1970). We believe, however, that the Fourth Amendment's warrant requirement is inapplicable to the situation before us, in part because it would serve little purpose, *see* note 56 *supra*, and hence this distinction between the two statutory schemes is unimportant for our purposes.

By contrast, the most recent report on surveillance conducted pursuant to the Omnibus Act indicates that for the calendar year 1974, the overall average percentage of incriminating intercepts to total intercepts per authorizing order was just over 50%. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORT ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS, January 1, 1974 to December 31, 1974, at X (Table 4). Particular wiretaps resulted in interceptions none, or only a very small percentage, of which were related to government law enforcement objectives. *Id.* at 2-11 (Table A-1), 23-70 (Table B-1). Even if we were to assume that some of the interceptions included in these figures were illegal and hence, the figures should be somewhat higher, nonetheless, the percentage of total intrusions related to statutory objectives appears to be strikingly higher under the Act before us than is true especially of individual instances of electronic surveillance, but also of such surveillance considered on average. The fact that only a small fraction of the vast number of materials here at issue seem likely to implicate Mr. Nixon's privacy suggests the reasonableness of the screening process contemplated by the Act.

Second, the infringement of privacy caused by review by archivists with an unblemished record for discretion, *see* p. 45 *supra*, is less wide-ranging than that resulting from ordinary criminal investigation whose purpose is use of evidence at trials exposed to the public.[59] Indeed,

[59] Plaintiff's brief makes frequent reference to the staff of 100 archivists who will be engaged to process the materials, *see Senate Hearings on GSA Regulations* at 4. The need for so large a staff arises from the enormous quantity of materials at issue. However, the figure of 100 archivists should not be taken to suggest that each document or conversation will be reviewed by all 100. Rather, we suspect that the processing scheme finally adopted—like the one that GSA has

although Mr. Nixon might, had he carried out his stated intention to establish a presidential library, have removed some of the most private materials before deposit, it seems unlikely that he, unlike his predecessors, would have had the time or the inclination to attempt to remove all documents implicating his privacy. *See* pp. 42-46 *supra*. Thus, we suspect that he contemplated permitting archivists to review materials in which he had a reasonable expectation of privacy. That would not, of course, operate to defeat his expectation. However, we do believe it helps to indicate that, in the special situation of documents accumulated by a President during his tenure and reviewed by professional government personnel, pursuant to a process employed by past Presidents, any intrusion into privacy interests is less substantial than it might appear at first.[60] *Cf. United States*

currently proposed—will ordinarily contemplate only one individual's screening any particular item, and when in difficult cases guidance is needed or administrative appeals are taken, there would still be only several, rather than five score, archivists involved. *See generally* Proposed Regulations, *supra* note 13, § 105-63.401-2.

[60] In his Reply Brief at 56, plaintiff insists that there is a

> seemingly obvious difference between review of materials by persons—be they archivists or not—acting under and responsible to the owner of the papers, and review by persons acting under directions of and responsible to a suspicious and hostile Congress and cowed executive officials.

This argument proves little to us except that what may be obvious to one person is not obvious to others. It is difficult to see how archivists, charged with the difficult and delicate task of screening materials with an eye toward historical value, protection of individual rights, and the classificatory needs of a documentary library, have a great deal of leeway in the performance of their duties for loyalty to individuals or institutions. So long as the standards defining the categories into which various materials are placed are proper, we see no reason to find improper the implementation of those stand-

v. Nixon, *supra*, 418 U.S. at 706 (stating, in the context of executive privilege rather than right to privacy, that "we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide"); *Sun Oil Co. v. United States*, *supra*, 514 F.2d at 1024. *See also* note 57 *supra*.

Third, it is possible that the regulations will expressly prohibit use in criminal investigation and prosecution of

ards by archivists whose record is a tribute to their profession, merely because particular personnel were selected by GSA rather than by Mr. Nixon.

Although in his Affidavit at 19, Mr. Nixon asserts that Presidents Truman, Eisenhower, and Johnson assisted in the selection of archivists to review files, the evidence in the record does not clearly establish whether that assertion is accurate. The record is most complete with respect to Lyndon Johnson, who appears to have recommended the individual who was later selected as Director of the Johnson Library but seems not to have played any role in the selection of the archivists actually performing the day-by-day processing. *See* Affidavit of Harry J. Middleton at 2; Letter of Aug. 12, 1975 from David J. Anderson to R. Stan Mortenson, at 2. It also appears that a committee of individuals designated by Herbert Hoover had a voice in the selection of Directors of the Hoover Library, Affidavit of Richard A. Jacobs at 3-4, and that Harry Truman expected to have some voice in selecting two archivists assigned to him immediately after he left office, *id.*, exhs. B, C, although it is unclear to what extent, if any, he ultimately participated in selection.

Mr. Nixon's real objection may be that the standards according to which materials are categorized are established by GSA rather than by him, an allocation of responsibility that we have already found to be justified. *See* pp. 46-48 *supra*. We also note that GSA, whether or not required to do so by regulation, *see* pp. 28-30 *supra*, might give Mr. Nixon some voice in the selection of personnel.

any information derived from archival processing. That possibility is far more than chimerical in light of the Special Prosecutor's having indicated he has obtained all evidence needed for his investigations.[61] *See* note 11 *supra*. In any event, such a prohibition could be imposed through judicial review of regulations were it thought to be constitutionally compelled. *See also* note 18 *supra*. The protections of the Fourth Amendment, of course, apply to searches that are unconnected to enforcement of criminal laws. *See, e.g., Camara v. Municipal Court, supra*, at 530-31. But there is considerable authority for the proposition that a less strict and particularized government showing is necessary to comply with the Fourth Amendment's reasonableness requirement when the search is entirely "civil" in nature. *See, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 278-79 (1973) (Powell, J., concurring); *Wyman v. James*, 400 U.S. 309, 321, 323-24 (1971); *id.* at 344 n.4 (Marshall, J., dissenting) (by implication); *Camara v. Municipal Court, supra*, at 530-31, 533, 537-38; White, *supra* note 56, at 178-80; Testimony of Attorney General Edward H. Levi before the Senate Select Comm. to Study Governmental Operations with respect to Intelligence Activities, Nov. 6, 1975, at 24-25, 32-35, 41-44.[62] *See also* note 56 *supra*.

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[61] We recognize, of course, that the Proposed Regulations, *supra* note 13, require archivists to bring to the attention of the Administrator, for referral to law enforcement officials, materials reflecting an apparent violation of the law. § 105-63.401-2(d). We reiterate, however, that until these regulations have lain before Congress for ninety legislative days, they have no legal force, and during that period are subject to disapproval by either House and perhaps to amendment by GSA itself.

[62] It might be suggested that such authority confuses rights and remedies; searches may unreasonably intrude upon privacy regardless of the use of any evidence obtained. We do not believe such an objection to be well-founded. Though it is beyond doubt that some searches are unreasonable merely

This authority also lends weight to the conclusion that any invasion of privacy interests—that is, any search and seizure—contemplated by the Act is reasonable.[63]

We would be less than candid were we to state that we find it as easy to dispose of Mr. Nixon's privacy claims as his claim of presidential privilege. But on balance, we believe that the congressional act here is a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives. The processing contemplated by the Act —at least as narrowed by carefully tailored regulations —represents the least intrusive manner in which to pro-

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because of their initial intrusive effect, the overall impact on an individual's privacy and security depends upon whether the government's motive is hostile or benign, the scope of any subsequent disclosure of private materials, and the harshness of any consequences that might follow. *See* Testimony of Attorney General Edward H. Levi, *supra*, at 43-44; note 56 *supra*.

[63] Mr. Nixon relies heavily upon Stanford v. Texas, 379 U.S. 476 (1965), as support for his privacy claim. *Stanford* involved a search designed to obtain evidence that an individual had violated a "many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years." *Id.* at 477. The search warrant, which the Court assumed to be issued upon probable cause, purported to authorize a search of private premises for books, records, and other materials concerning illegal Communist activities. Several officers spent more than four hours gathering about half the books they found in Stanford's house, and those seized included works of Sartre, Marx, Pope John XXIII, Justice Hugo Black, Theodore Draper, and Earl Browder, as well as private documents including a marriage certificate, insurance policies, household bills and receipts, and personal correspondence. *Id.* at 479-80. The Court held this to be an unconstitutional general search, noting also that special care in protect-

vide an adequate level of promotion of government interests of overriding importance. *See United States v. Biswell*, 406 U.S. 311, 315-16 (1972); *Camara v. Municipal Court, supra*, at 535-36; (1967); LaFave, *Administrative Searches and the Fourth Amendment*, 1967 SUP. CT. REV. 1, 14-17. Although the invasion of Mr. Nixon's privacy from processing, even by discreet and professional government archivists, of all of the materials at issue is not insignificant, we do believe, in light

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ing Fourth Amendment rights is appropriate when the things to be seized are books and the basis for their seizure is their content. *Id.* at 485.

Although the concern for limiting government intrusions where First and Fourth Amendment protections coalesce is an important one, we do not believe *Stanford* to be in any way controlling. First, the seizures in that case were enormously overbroad, encompassing material whose seizure was plainly unrelated to any legitimate government objectives. That is not the case as respects the comprehensive screening process necessary here to further a variety of valid legislative objectives. Second, the law enforcement officials made no attempt, in either procuring or executing the warrant, to minimize the intrusion, a possibility that may occur, either through force of regulation or as a matter of archival practice, under the Act. *See* pp. 81-82 *supra*. Third, the search in *Stanford* intruded upon all of an individual's personal papers maintained in his private home in the hopes of finding a few pieces of incriminating evidence, as compared to screening millions of pages of presidential materials not implicating privacy concerns and related to government objectives and, as an inescapable concomitant of that process, reviewing the small fraction of the materials that is private. Fourth, the very purpose of the search in *Stanford* was to enforce criminal laws, a purpose that is not central and might even be prohibited under this Act. Finally, although the *Stanford* Court was not required to reach the question of the constitutionality of the state statute involved, it may well have been influenced by the belief that government investigation or prosecution of suspected Communists, if not unconstitutional under the First Amendment, was at the very least not an admirable spectacle.

of the special circumstances before us in this case, that it is not unreasonable and hence does not call into question the facial constitutionality of the Act. Hence, we find plaintiff's claim to be without merit."[64]

V. FREEDOM OF SPEECH AND ASSOCIATION

Mr. Nixon asserts that the Act denies him the protection of expressive activity guaranteed by the First Amendment. The argument is cast in a variety of forms. It is alleged that the Act invades the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by Mr. Nixon—especially those critical of themselves—will refuse to associate with him. The Act is furthermore said to chill Mr. Nixon's expression because he will be "saddled" with prior positions communicated in private, leaving him unable to take inconsistent positions in the future. Finally, the example of the Act, plaintiff asserts, will limit free expression by and to political figures in the future. Although these arguments vary somewhat in content as well as in coherence and plausibility, it should be clear that the grava-

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[64] Plaintiff also claims to be able to assert the constitutional rights of third parties whose privacy interests may be invaded by processing under the Act. He does not indicate why it is that he should be able to assert these third party rights, *see generally* Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974), but we do not believe that we must face the sometimes tricky issue of standing. *Cf.* Ripon Soc'y v. National Repub. Party, Nos. 74-1337, 74-1358 (D.C. Cir. Sept. 30, 1975) (en banc), manuscript slip. op. at 25 n.28. For even were we to assume *arguendo* that such an assertion was appropriate, we would find that the infringement of any other individual's privacy to be far less global and equally well-justified so as to be an *a fortiori* case.

men of each of them is the harm to Mr. Nixon's First Amendment interests caused by disclosure of the materials so as to violate his associational privacy.

It is undisputed that the First Amendment's protection of freedom of expression encompasses association for the advancement of political ideas. *E.g., Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-62 (1958). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462. Where an infringement of associational freedom can be shown, the government bears the burden of showing that the action it defends serves a compelling government interest that cannot be promoted in a less restrictive way. *E.g., Kusper v. Pontikes, supra*, at 58-59; *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Mr. Nixon invokes this established First Amendment doctrine in pressing his claim.

This contention is in its structure not very different from the Fourth Amendment question we have just discussed. It too is limited to the constitutionality of a screening process necessary to classify and categorize materials only some of which implicate Mr. Nixon's constitutionally protected interest in associational privacy. There are, undoubtedly, some materials mingled among the great bulk that truly implicate Mr. Nixon's ability to associate in private in order to advance political ideas, and the fraction of these as compared to the total is unlikely to differ substantially in size from that fraction implicating his Fourth Amendment interests. *See* pp. 69-71 *supra*. Here, too, Mr. Nixon may have in effect waived his right to invoke freedom of association with respect to certain portions of the materials which he earlier dis-

closed. *Cf.* pp. 41-42, 71 *supra*. And although the great bulk of the materials appear to be unrelated to Mr. Nixon's constitutional interests, he appears to have a legitimate expectation that he would have an opportunity to remove some of the sensitive political documents before any government screening took place. *See* pp. 72-75 *supra*.

The allegations of infringement of rights here, however, are predicated on the assumption that all materials will be opened to public access without any protection of plaintiff's constitutional interest in, *inter alia*, associational privacy. *See* Plaintiff's Brief at 144, 149, 150-52; Reply Brief at 60-62. This is an assumption, as noted above, which we have no reason to accept or to base a ruling upon.[65] Hence, we need not resolve the debate

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[65] The Proposed Regulations, *supra* note 13, mandate restrictions on public access to materials implicating "personal privacy." *See* note 52 *supra*. We believe that it is entirely possible to read personal privacy so as to include the privacy in political association protected by the First Amendment, and, if this were the case, then these regulations would be inconsistent with plaintiff's assumption.

The intervenor-defendants include journalists whose interest would seem to lie in the broadest immediate disclosure of all materials of interest to the reading public. Yet at the oral argument on the merits of this case, certain of their counsel conceded that some materials would fall within the protection of the First Amendment. Mr. Herzstein suggested three possible meanings of "political materials": first, those relating to the abuse of government power for political purposes; second, those relating to the exercise of political influence and national leadership in the national interest as perceived by the Chief Executive; and third, truly personal political activity. Transcript at 71-72. The record proceeds as follows:

> Mr. Herzstein: . . . If Mr. Nixon was a member of the ACLU or the John Birch Society or the Republican Party, his personal involvement with that organization,

between plaintiff, on the one hand, and defendants and any intervenor-defendants, on the other, as to whether the kinds of burdens Mr. Nixon alleges are cognizable and not excessively speculative. For we believe that any burden arising solely from review by professional and discreet archivists is not significant, and certainly not significant enough to outweigh countervailing government interests. Mr. Nixon's freedom to continue to express himself on public issues will not be impaired if a handful of government archivists privately know the contents of materials in which plaintiff may or may not have taken inconsistent positions. Similarly, that private knowledge of archivists will not deter individuals with whom Mr. Nixon has associated (or would like to associate) from participating with him in political activities. For these reasons, we do not believe that the Act will in any significant way chill association by or with future presidents. *Cf.* pp. 42-46 *supra*. Finally, there is no showing here of the kinds of sanctions, coercion, harassment, or other oppression that characterized such cases as *NAACP v. Alabama ex rel. Patterson*, *supra*, at 462,

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to the extent it involved no connection with his use of his public office, then we feel that is a personal record.

Judge McGowan: That could be left out.

Mr. Herzstein: And that could be left out, that's right.

Id. at 72. Counsel for another of the groups of intervenors indicated his agreement:

Mr. Friedman: . . .

I would start right out by agreeing that there is some material in this group which would be protected by the First Amendment. Mr. Herzstein referred to personal associations of Mr. Nixon, a list of his own personal political contributions, a list of whom he voted for in his entire life, all of that would be protected by the First Amendment.

Id. at 74.

and *Bates v. Little Rock*, *supra*, at 523-24, in which the doctrine of associational freedom was first developed, and that more recently were accorded considerable significance by another three-judge court in this district, *see* Order of October 22, 1975 in *Doe v. Martin*, Civil No. 75-0083, at 3-14. Rather, this case is not unlike *Buckley v. Valeo*, *supra*, where the court of appeals in this circuit considered whether auditing provisions of the Federal Election Campaign Act that authorize the Federal Election Commission to inspect but not to disclose confidential records of political contributions violate the First Amendment. The court there held that "the confidential status of those records precludes any claim of real or threatened injury to plaintiff's First Amendment interests arising from public disclosure." 519 F.2d at 865. Plainly put, plaintiff has provided us with no reason to believe that screening by government personnel, by itself, undermines his First Amendment freedoms. *See also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 51-52, 56-57 (1974). And since, as was noted earlier, the Act is a legitimate and not unnecessarily restrictive means of furthering government interests of great importance, we find no basis whatsoever for upholding Mr. Nixon's challenge to the Act on First Amendment grounds.[66]

VI. Equal Protection

Mr. Nixon challenges the Act on the ground that, by singling out the papers accumulated during his tenure in office, it denies him the equal protection of the law. We believe, however, that there is adequate justification for the difference in treatment between him and other Presidents. His papers were in a unique status. Those

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[66] Insofar as plaintiff purports to assert the rights of third parties, we find such a claim to be without merit, for reasons discussed in note 64 *supra*.

of his latter-day predecessors in office had already been deposited in presidential libraries, *see* p. 43 *supra*, and were, therefore, available (albeit on a restricted basis in some cases) to historians, the public, and the three branches of government. The papers of his successors were yet to come into being or, in the case of President Ford, still in active use by the incumbent administration. Legislating with respect to Mr. Ford might have directly and adversely affected executive policymaking. *Cf.* p. 38 *supra*. Legislating with respect to any future President might have been unwise when the considered study by the Commission established by Title II of the Act of the sensitive, complex, and often technical questions relating to government documents had not been completed. *See* 120 CONG. REC. S 18244-45 (daily ed. Oct. 3, 1974) (remarks of Sen. Javits); *id.* at H 11208 (daily ed. Dec. 3, 1974) (remarks of Rep. Brademas); *id.* at H 11212 (statement of Rep. Bingham). Only Mr. Nixon was in the intermediate status of having terminated his service as President but not yet having established a presidential library.

Mr. Nixon has emphasized that the materials would have been preserved for at least three years under the Nixon-Sampson agreement. The implication is that there was no urgent need for immediate governmental control or for singling out plaintiff; during that period, Mr. Nixon might have established a presidential library, making him like past Presidents of the modern era, or the Commission might have finished its work, enabling Congress to apply the same standards to him and to future Presidents. This argument, we believe, misses the point. The possibility existed that Mr. Nixon and the GSA might decide to amend the agreement so as to foreshorten the three-year period. Even within the course of three years' time, there was no assurance either that Mr. Nixon would plan to establish a presidential library or that the

Commission would have completed a study that would be translated into law. Indeed, at this date—over 15 months after the Nixon-Sampson agreement was formed—the Commission's first meeting has just been held, although its report to the President and Congress is to be transmitted no later than March 31, 1976, *see* 44 U.S.C.A. § 3322 (Supp. I, Feb. 1975). Although Mr. Nixon has asserted that he intends to establish a presidential library at the University of Southern California, *see* Nixon Affidavit at 19; Affidavit of John R. Hubbard at 1-2, no binding arrangements have yet been made.[67]

In addition, there was a distinct disadvantage to waiting for the completion of the Commission's report: in the interim, no progress could be made in the lengthy process of reviewing, classifying, and housing the materials so that they might become available for a variety of uses. On the assumption that processing could begin in the spring of 1976, GSA estimates that the materials whose review would receive first priority would not be fully processed until the fall of 1979. The first priority materials comprise only 21% of the total, and although the other 79% can be processed more quickly, they would receive no attention, except for initial shelving and arranging, until the 1980s. *Senate Hearings on GSA Regulations* at 115-19. Similarly, the tape recordings would not be fully processed until the end of 1979. *Id.* at 132. The examples in the record of requests from a variety of individuals or agencies for access to materials in presi-

[67] It is of course understandable that no final arrangements could be made given the uncertainty, generated by the passage of the Act and by this and other litigation, about the nature of Mr. Nixon's rights and interests in the materials. Nonetheless, it is noteworthy that not only were there no binding plans at the time that the Act was passed, but that investigation of the possibility of establishing a library at USC began only after the passage of the Act. *See* Affidavit of John R. Hubbard at 1.

dential libraries having to be refused merely because processing had not been completed [68] indicates the importance of beginning the lengthy processing period as promptly as possible, so that access to the materials by the public or by government officials would not be unduly delayed.

Finally, as noted above, *see* pp. 46-48 *supra*, Congress had before it an adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue. This aspect of the case provides a basis for distinguishing him from other Presidents, whose inclination to serve important public interests in disposing of such materials Congress had less reason to question. It also reinforces the dangers of deferring congressional action in the event that the agreement were amended, or, after three years' time, no satisfactory arrangements for a presidential library existed and the Commission report was not completed or acted upon. We believe that this additional factor makes even clearer what is already apparent, namely, that there was adequate justification for according different treatment to these materials than to those accumulated during other Presidential administrations. *See also* note 35 *supra*.

Mr. Nixon also suggests that the Act must be subjected to heightened scrutiny and requires compelling justifications because it infringes his fundamental interest both in free speech and association and in privacy. The first of these interests has already been discussed in its own right, as the protections of the First Amendment apply directly to the case, and we found the in-

[68] *See* Letter of August 12, 1975 from David J. Anderson to R. Stan Mortenson, at 2; Affidavit of Harry J. Middleton at 3-4 & exhs. A, B; Letter of July 23, 1975 from Benedict K. Zobrist, Director of the Truman Library, to R. Stan Mortenson, at 1-2; Affidavit of William R. Emerson, July 22, 1975, exh. I.

fringement of expressive interests to be insubstantial and amply justified. That analysis, we believe, is fully dispositive of any equal protection claim resting upon so-called strict scrutiny. *See, e.g., Police Dept. v. Mosley*, 408 U.S. 92, 94-102 (1972); Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 29-30; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 153-55 & nn. 36, 39 (1974). As for the privacy claim, Mr. Nixon provides no authority indicating that the kind of privacy interests whose protection he seeks has heretofore been provided under the equal protection clause, and we know of none; but even if such authority existed we believe once again that the analysis above of the infringement of those interests, as compared to the furtherance of important legislative objectives, disposes of his claim.

VII. BILL OF PAINS AND PENALTIES

Article I, section 9, clause 3 of the Constitution prohibits the legislature from enacting a bill of attainder, which is a legislative determination of guilt and imposition of punishment upon a specified group or specified individuals without the safeguards of a judicial trial. *E.g., United States v. Brown*, 381 U.S. 437, 441-46 (1965); *id.* at 462-64 (White, J., dissenting); *Flemming v. Nestor*, 363 U.S. 603, 613 (1960); *id.* at 627 (Black, J., dissenting); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (plurality opinion); *United States v. Lovett*, 328 U.S. 303, 315-17 (1946); *id.* at 321-22 (Frankfurter, J., concurring). Strictly speaking, an act is a bill of attainder when the punishment is death, and a bill of pains and penalties when the punishment is less severe, but both kinds of punishment have been held to fall within the scope of the constitutional prohibition. *E.g., United States v. Lovett, supra*, at 323-24 (Frankfurter, J., concurring); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

Plaintiff's argument that the Act is a bill of pains and penalties rests primarily upon the general political atmosphere asserted to exist at the time the legislation was passed. As Mr. Nixon describes it, there was a period of great political turbulence during and following "Watergate": congressional inquiries had generated widespread allegations of misconduct; articles of impeachment had been recommended by a House committee; and in the wake of that recommendation there followed a presidential resignation. A presidential pardon granted Mr. Nixon by his successor generated enormous controversy and, on the part of some legislators, anger, frustration, and a determination not to let the pardon prevent airing of the whole Watergate affair to the public. In light of these circumstances, plaintiff asserts that the Act was designed to punish him for the wrongdoing that was alleged, and hence falls within the bill of attainder clause. Plaintiff's Brief at 195-205; Plaintiff's Reply Brief at 63-66.

Assuming *arguendo* that this characterization of legislative sentiment is accurate, we believe it falls far short of making out a meritorious bill of attainder claim. Congress may often be angered or frustrated by executive decisions, and may often attempt to bring to the notice of the public information bearing upon allegations of wrongdoing by government officials. Whether or not such congressional activity is likely to represent a wise exercise of legislative power, it is not automatically punitive in character. And when plaintiff moves from asserting the existence of anger and frustration to asserting punitive motivation, he uniformly fails to adduce any evidence from the legislative record or otherwise to support his contention.[69] Surely not any piece of legislation, or

[69] For example, after providing citations to various statements by members of Congress and to newspaper articles designed to support plaintiff's characterization of the political atmosphere, Plaintiff's Brief at 198 shifts to the statement that "[m]any in Congress perceived the legislation as the only way in which they could exact a penalty which they felt was due," without any support whatsoever for that statement. The next sentence, insisting that the Act and the debates preceding its passage indicate a congressional design to inflict punishment upon an individual thought to be guilty of criminal acts, stands similarly unsupported. What follows in the brief indicates little more than a legislative desire to obtain the whole truth about Watergate in part because the pardon of Mr. Nixon had prevented criminal proceedings from serving that role, *id.* at 199; this legislative objective is not illegitimate or necessarily punitive, *see* p. 58 & note 16 *supra*. The brief proceeds further by again leaping to a conclusion—that the "tone of anger and the conclusions of guilt" in the debates reveal a punitive purpose, Plaintiff's Brief at 200, without any support for that allegation. Similarly, a congressional recitation of alleged wrongdoings, *see id.* at 202; Reply Brief at 63-65, can reflect legitimate legislative considerations, *see* pp. 46-48 *supra*, as easily as punitive motivation, and once more plaintiff fails to document or demonstrate the latter.

any piece of legislation more or less related to "Watergate," that was passed during times that Mr. Nixon asserts were turbulent must be found unconstitutional on bill of attainder grounds. Whether it is depends upon a demonstration of punitive intent or character, and that demonstration is patently lacking here.

The test of whether a legislative enactment is punitive in nature has been variously stated. To some extent it has rested upon whether there exist other, non-punitive, purposes that may plausibly be assigned to the legislation, *e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963); *Trop v. Dulles*, 356 U.S. 86, 107-10 (1958) (plurality opinion);[70] *Cummings v. Missouri*,

[70] Strictly speaking, neither *Mendoza-Martinez* nor *Trop* involved a bill of attainder claim. However, in both cases, the issue was quite similar to such a claim; in *Mendoza-Martinez*, whether a statute which automatically imposes forfeiture of citizenship, without judicial or administrative proceedings, is

supra, at 319-20, and in this case, as we have already noted, we find such alternative purposes plainly present. *See* pp. 49-61 *supra*. A similar test, and one whose application leads to the same conclusion, is that indicated in *Flemming v. Nestor*, *supra*, at 614, *quoting De Veau v. Braisted*, *supra*, at 160 (plurality opinion):

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.
>
> . . . .
>
> "The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."

There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a *penalty* upon *Mr. Nixon*, by depriving him of custody and control of the disposition of the materials at issue, as punishment for alleged

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penal in character and hence deprives individuals of citizenship rights without due process of law and other safeguards, 372 U.S. at 164; in *Trop*, whether denationalization may be inflicted as a punishment, 356 U.S. at 94. Both decisions relied in part upon bill of attainder precedents, and we find nothing in them to indicate that the nature of their determination of whether punishment was imposed by legislative act differs from that determination in bill of attainder cases.

past wrongdoings.[71] There is, however, ample evidence that Congress cared about *regulating* how the *materials* would be treated in *the future* in order to ensure that such treatment will be consistent with Congressional perceptions of the public interests. *See* pp. 48-61 *supra*.[72] Moreover, in determining whether depriving Mr. Nixon of absolute control of the materials constitutes punishment, other indicators—whether the deprivation has historically been regarded as punishment, whether it comes into effect only upon a finding of scienter, and whether the behavior to which it applies is already a crime, *Kennedy v. Mendoza-Martinez*, *supra*, at 168; whether the deprivation seems especially severe in context, *id.* at 169; *Cummings v. Missouri*, *supra*, at 317-18—also point toward a negative conclusion. Control over processing of presidential materials has not traditionally been associated with either crime or punishment, and the operation of the Act in no way depends on the scienter of Mr. Nixon or anyone else. Moreover, in relation to the congressional purposes, the Act could not have been drawn more narrowly, *see* pp. 62-63 *supra*, and any effect on Mr. Nixon cannot be thought, in context, to be at all severe, or unnecessary, or merely punitive. The legislative history leads to only one conclusion, namely,

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[71] Congress may well have relied in part upon the allegations of wrongdoing by Mr. Nixon as a basis for treating him differently from other Presidents. As a theoretical matter, such reliance is equally consistent with (1) a desire to punish for past wrongdoing and (2) a desire to regulate the future treatment of the presidential materials. As a factual matter, such reliance appears from the legislative record to have been motivated by the second concern alone. *See* pp. 48-61 & note 69 *supra*.

[72] That evidence, together with the ample basis for a congressional decision to treat Mr. Nixon somewhat differently from other presidents, *see* pp. 93-97 *supra*, suggests that the Act's singling out Mr. Nixon is of no special significance with respect to allegations that the Act constitutes punishment.

that the Act before us is regulatory and not punitive in character.

That conclusion is reinforced by specific aspects of the Act that just do not square with the claim that the Act was a punitive measure. Section 102(b) of the Act gives Mr. Nixon as well as other individuals the right to contest any legal process directed to the materials by asserting any rights, defenses, or privileges he may have. Section 102(c) provides him or his designees with a right of access at all times to all materials covered by the Act. Section 104(a) directs the Administrator, in promulgating regulations, to consider both the need to protect any party's opportunity to assert any legal or constitutional right or privilege (subsection 5), and the need to give to Mr. Nixon or his heirs, for his or their sole custody and use, any tape recordings or materials whose preservation is unnecessary to further legislative ends (subsection 7). Section 105(a) provides for jurisdiction and expedited treatment of various claims arising under the Act, and was designed in part to provide plaintiff with an expedited route to follow in seeking to protect any rights he believed had been infringed, *see* 120 CONG. REC. S 18239 (daily ed. Oct. 3, 1974) (remarks of Sen. Ervin). Section 105(c) provides for payment of compensation to any individual who is found to have been deprived of private property by the operation of the Act. Provisions such as these are not the trappings of a punitive and vindicative enactment.[73] Finally, the establishment in Title II of a Commission to study records of federal officials reflects Congress' perception of a genuine regulatory problem and the need for action to solve that problem in the future. Even if it could

[73] Indeed, the legislative record contains numerous references to the need to protect plaintiff's constitutional rights under the Act. *See, e.g.*, S. REP. No. 93-1181, 93d Cong., 2d Sess., at 2-3, 4-5, 5-6 (1974); pp. 24-25 *supra*.

plausibly be alleged that a legislature whose design was to punish would choose as the penalty deprivation of control over these original materials—surely an odd form of punishment—it strains credulity to argue that the deprivation of control, in the context of and as limited by these specific statutory provisions, was intended to inflict punishment within the reach of the bill of attainder clause.

The approach of the Bicentennial Year has already seen a widening appreciation of the importance of the preservation of our historical heritage. It seems inevitable that Congress would, sooner or later, address itself to the formulation of a uniform policy with respect to the disposition of the papers of presidents and other significant functionaries of the federal government.

Had the Act before us been fully prospective, it seems fair to say that non[illegible]f the constitutional problems dealt with hereinabove would have been serious. Mr. Nixon, however, served as President for over five years in a highly eventful period, accumulating vastly more papers illuminative of his time in office than any other President. Moreover, his tenure of the office ended under extraordinary circumstances which have themselves become an important fact of our national history, and which brought sharply into focus the need for Congress to make a start upon the articulation of a coherent policy of records preservation. To start with Mr. Nixon himself was surely not an irrational determination, but it presents problems which both the face of the Act and its legislative history show Congress to have been keenly aware of.

We do not believe those problems to be such as to justify stopping the Act in its tracks, given its scheme of implementation by regulations in the writing of which

Congress itself has retained a role. But sensitivity to constitutional protections cannot end with the adoption of the Act itself. It must permeate, in both regulation and practice, the effectuation of the Act as well.

Although we hold that the facial constitutionality of the Act requires dismissal of the complaint, we think it appropriate, pending the final disposition of any appeal plaintiff may deem it advisable to take, to enjoin any processing or disclosure of the materials in question except for the very limited purposes hereinafter appearing.

APPENDIX A

(CAPTION OMITTED IN PRINTING)

(FILED APRIL 1, 1976)

Order

It is ordered by the Court *sua sponte* that the Opinion and Order of January 7, 1976, in the above-captioned case be and hereby is amended as follows:

1. On page 14, the last line of footnote 8, the section "105.63.101-.303" should be "105-63.101-.303".

2. On page 48, lines 17 and 18 of footnote 35, for the phrase "eventual access to particular materials by," substitute the phrase "making the materials available within the shortest possible time to".

3. On page 54, line 6, after the word "practice.", insert the following two sentences: "As is described in detail in note 1 *supra*, the materials which plaintiff claims the right to control include vital information relating to domestic policy-making conducted entirely within the White House or by the White House in conjunction with executive agencies, and records of communications with foreign governments or White House communications with executive agencies concerning foreign affairs. Much of this information is contained only in the materials under dispute in this case."

4. On page 60, lines 21 and 22 of footnote 46, the phrase "the fact that disclosure was opposed by the Special Prosecutor because it might prejudice pending criminal prosecutions," should be "at least in the view of the District Court, disclosure might have prejudiced pending criminal prosecutions,".

5. On page 63, the last line, after the word "overbroad. 49", insert the following two sentences: "Moreover, it was necessary for Congress not merely to take custody of

the materials, but also to ensure that their processing commenced promptly so that, to the maximum extent possible, the numerous requests for access to materials that had already been received, *see* notes 41, 45 *supra*, or could reasonably be expected, would not have to be denied (as had happened in the past, *see* sources cited note 68 *infra*) merely because the requested materials had not been processed. *See* pp. 95-96 *infra.*''

6. On page 65, the last line of footnote 49, the word ''constitutionally'' should be ''constitutionality''.

7. On page 77, the second line from the bottom of footnote 56, the phrase ''searches take'' should be ''a one-time search takes''.

8. On page 80, line 10, after the word ''according'' insert the word ''to''.

9. On page 96, line two, the word ''indicates'' should be ''indicate''.

10. On page 96, line six, after ''delayed.'', add *''See also* notes 41, 45 *supra.''*.

/s/ Carl McGowan
Carl McGowan
United States Circuit Judge

/s/ Edward A. Tamm
Edward A. Tamm
United States Circuit Judge

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States District Judge

Date: April 1, 1976

APPENDIX B

Order

In acordance with the foregoing opinion, it is this 7th day of January, 1976.

Ordered that the preliminary and permanent injunctive relief prayed for by plaintiff is denied and the complaint dismissed as without merit; and, pending the final disposition of any appeal from this decision, it is

Further Ordered that the defendants, their superiors, agents, and assigns are hereby enjoined from processing, disclosing, inspecting, transferring, or otherwise disposing of any materials, be they documents, papers, tape recordings or other items, which might fall within the coverage of sections 101(a), (b) of the Presidential Recordings and Materials Preservation Act and which are now or may in the future be in their custody, except as is specifically provided hereinafter; and it is

Further Ordered that this injunction shall not bar production of materials pursuant to any subpoena or other lawful process in accordance with the procedures established in 41 C.F.R. §§ 105-63.201 to .207, .303; and it is

Further Ordered that Mr. Nixon or his designated agent shall at all times have access to the materials in accordance with 41 C.F.R. §§ 105-63.201 to .207, .301, and shall have the right to obtain photographic reproductions of any documentary material; and it is

Further Ordered that only the defendants or their agents shall undertake to reproduce any materials, and shall not permit any other person to do so; and it is

Further Ordered that the injunction shall not bar inspection and photographic reproduction of documentary material when needed for current business of the executive branch of the federal government, pursuant to a request

that has been approved by both the head of the agency or department of the executive branch seeking access and by defendant Philip W. Buchen or his successor, although plaintiff shall receive notice of any access requested ten days prior to the grant thereof in order to be able to raise in court any defenses, rights, or privileges that might bar such access, and if such opposition is presented, defendants shall not permit access until the issue has been resolved in court, and any such access granted shall be in accordance with the procedures of 41 C.F.R. §§ 105-63.201 to .207; and it is

FURTHER ORDERED that this court will retain jurisdiction of this case in order to consider whatever additions, deletions, or changes in this order might be deemed appropriate.

/s/ CARL MCGOWAN
Carl McGowan
United States Circuit Judge

/s/ EDWARD A. TAMM
Edward A. Tamm
United States Circuit Judge

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
U.S. District Judge

January 7, 1976

APPENDIX C

(CAPTION OMITTED IN PRINTING)

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Richard Nixon, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order in this action on January 7, 1976 denying plaintiff's request for a preliminary and permanent injunction and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C. § 1253.

/s/ HERBERT J. MILLER, JR.
Herbert J. Miller, Jr.

/s/ RAYMOND G. LARROCA
Raymond G. Larroca

/s/ WILLIAM H. JEFFRESS, JR.
William H. Jeffress, Jr.

/s/ R. STAN MORTENSON
R. Stan Mortenson

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
Counsel for Plaintiff

DATED: March 4, 1976

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)

APPENDIX D

Public Law 93-526

NINETY-THIRD CONGRESS OF THE UNITED STATES OF AMERICA
AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

Delivery and Retention of Certain Presidential Materials

Sec: 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Government and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

Availability of Certain Presidential Materials

Sec. 102. (a) None of the tape recordings or other materals referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpena or other lawful process, for access to such

recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

Regulations to Protect Certain Tape Recordings and Other Materials

Sec. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

Regulations Relating to Public Access

Sec. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of

governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any changes in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An amendment to such motion is not in order, and it is not in

order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such chal-

lenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

TITLE II—PUBLIC DOCUMENTS COMMISSION

SHORT TITLE

SEC. 201. This title may be cited as the "Public Documents Act".

ESTABLISHMENT OF STUDY COMMISSION

SEC. 202. Chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new sections:

"§ 3315. Definitions

"For purposes of this section and section 3316 through section 3324 of this title—

"(1) the term 'Federal official' means any individual holding the office of President or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, or any officer of the executive, judicial, or legislative branch of the Federal Government;

"(2) the term 'Commission' means the National Study Commission on Records and Documents of Federal Officials; and

"(3) the term 'records and documents' shall include handwritten and typewritten documents, motion pictures, television tapes and recordings, magnetic tapes, automated data processing documentation in various forms, and other records that reveal the history of the Nation.

"§ 3316. Establishment of Commission

"There is established a commission to be known as the National Study Commission on Records and Documents of Federal Officials.

"§ 3317. Duties of Commission

"It shall be the duty of the Commission to study problems and questions with respect to the control, disposition, and preservation of records and documents produced by or on behalf of Federal officials, with a view toward the development of appropriate legislative recommendations and other recommendations regarding appropriate rules and procedures with respect to such control, disposition, and preservation. Such study shall include consideration of—

"(1) whether the historical practice regarding the records and documents produced by or on behalf of

Presidents of the United States should be rejected or accepted and whether such practice should be made applicable with respect to all Federal officials;

"(2) the relationship of the findings of the Commission to the provisions of chapter 19 of this title, section 2101 through section 2108 of this title, and other Federal laws relating to the control, disposition, and preservation of records and documents of Federal officials;

"(3) whether the findings of the Commission should affect the control, disposition, and preservation of records and documents of agencies within the Executive Office of the President created for short-term purposes by the President;

"(4) the recordkeeping procedures of the White House Office, with a view toward establishing means to determine which records and documents are produced by or on behalf of the President;

"(5) the nature of rules and procedures which should apply to the control, disposition, and preservation of records and documents produced by Presidential task forces, commissions, and boards;

"(6) criteria which may be used generally in determining the scope of materials which should be considered to be the records and documents of Members of the Congress;

"(7) the privacy interests of individuals whose communications with Federal officials, and with task forces, commissions, and boards, are a part of the records and documents produced by such officials, task forces, commissions, and boards; and

"(8) any other problems, questions, or issues which the Commission considers relevant to carrying out its duties under section 3315 through section 3324 of this title.

"§ 3318. Membership

"(a)(1) The Commission shall be composed of seventeen members as follows:

"(A) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the majority leader of the House;

"(B) one Member of the House of Representatives appointed by the Speaker of the House upon recommendation made by the minority leader of the House;

"(C) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the majority leader of the Senate;

"(D) one Member of the Senate appointed by the President pro tempore of the Senate upon recommendation made by the minority leader of the Senate;

"(E) one Justice of the Supreme Court, appointed by the Chief Justice of the United States;

"(F) one person employed by the Executive Office of the President or the White House Office, appointed by the President;

"(G) three appointed by the President, by and with the advice and consent of the Senate, from persons who are not officers or employees of any government and who are specially qualified to serve on the Commission by virtue of their education, training, or experience;

"(H) one representative of the Department of State, appointed by the Secretary of State;

"(I) one representative of the Department of Defense, appointed by the Secretary of Defense;

"(J) one representative of the Department of Justice, appointed by the Attorney General;

"(K) the Administrator of General Services (or his delegate);

"(L) the Librarian of Congress;

"(M) one member of the American Historical Association, appointed by the counsel of such Association;

"(N) one member of the Society of American Archivists, appointed by such Society; and

"(O) one member of the Organization of American Historians, appointed by such Organization.

"(2) No more than two members appointed under paragraph (1) (G) may be of the same political party.

"(b) A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

"(c) If any member of the Commission who was appointed to the Commission as a Member of the Congress leave such office, or if any member of the Commission who was appointed from persons who are not officers or employees of any government becomes an officer or employee of a government, he may continue as a member of the Commission for no longer than the sixty-day period beginning on the date he leaves such office or becomes such an officer or employee, as the case may be.

"(d) Members shall be appointed for the life of the Commission.

"(e)(1) Members of the Commission shall serve without pay.

"(2) While away from their homes or regular places of business in the performance of services for the Commission, members of the Commission shall be allowed travel expenses in the same manner as persons employed intermittently in the service of the Federal Government are allowed expenses under section 5703(b) of title 5, United

States Code, except that per diem in lieu of subsistence shall be paid only to those members of the Commission who are not full-time officers or employees of the United States or Members of the Congress.

"(f) The Chairman of the Commission shall be designated by the President from among members appointed under subsection (a)(1)(G).

"(g) The Commission shall meet at the call of the Chairman or a majority of its members.

"§ 3319. Director and staff; experts and consultants

"(a) The Commission shall appoint a Director who shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5315).

"(b) The Commission may appoint and fix the pay of such additional personnel as it deems necessary.

"(c)(1) The Commission may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-15 of the General Schedule (5 U.S.C. 5332).

"(2) In procuring services under this subsection, the Commission shall seek to obtain the advice and assistance of constitutional scholars and members of the historical, archival, and journalistic professions.

"(d) Upon request of the Commission, the head of any Federal agency is authorized to detail, on a reimbursable basis, any of the personnel of such agency to the Commission to assist it in carrying out its duties under sections 3315 through 3324 of this title.

"§ 3320. Powers of Commission

"(a) The Commission may, for the purpose of carrying out its duties under sections 3315 through 3324 of this title,

hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Commission may deem desirable.

"(b) When so authorized by the Commission, any member or agent of the Commission may take any action which the Commission is authorized to take by this section.

"(c) The Commission may secure directly from any department or agency of the United States information necessary to enable the Commission to carry out its duties under section 3315 through section 3324 of this title. Upon request of the Chairman of the Commission, the head of such department or agency shall furnish such information to the Commission.

"§ 3321. Support services

"(a) The Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services and assistance as the Commission may request.

"(b) The Archivist of the United States shall provide to the Commission on a reimbursable basis such technical and expert advice, consultation, and support assistance as the Commission may request.

"§ 3322. Report

"The Commission shall transmit to the President and to each House of the Congress a report not later than March 31, 1976. Such report shall contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation, administrative actions, and other actions, as it deems appropriate.

"§ 3323. Termination

"The Commission shall cease to exist sixty days after transmitting its report under section 3322 of this title.

"§ 3324. Authorization of appropriations

"There is authorized to be appropriated such sums as may be necessary to carry out section 3315 through section 3324 of this title.".

TECHNICAL AMENDMENT

SEC. 203. The table of sections for chapter 33 of title 44, United States Code, is amended by adding at the end thereof the following new items:

"3315. Definitions.
"3316. Establishment of Commission.
"3317. Duties of Commission.
"3318. Membership.
"3319. Director and staff; experts and consultants.
"3320. Powers of Commission.
"3321. Support services.
"3322. Report.
"3323. Termination.
"3324. Authorization of appropriations.".

/s/ CARL ALBERT
Speaker of the House of Representatives.

/s/ LEE METCALF
Acting President of the Senate pro Tempore.

APPENDIX E

OFFICE OF THE WHITE HOUSE PRESS SECRETARY

THE WHITE HOUSE

Text of a Legal Opinion by the Attorney General

September 6, 1974

The President.
The White House.

Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In *Folsom* v. *Marsh*, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D., Mass. 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his

official correspondence,[1] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2] A classic exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through

[1] The official documents involved in the case were:

Letters addressed by Washington, as commander-in-chief, to the President of Congress.

Official letters to governors of States and speakers of legislative bodies.

Circular letters.

General orders.

Communications (official) addressed as President to his Cabinet.

Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105. The clear holding on the property point (*Id.* at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (*Id.* at 114).

[2] Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, *To provide for the acceptance and maintenance of Presidential libraries, and for other purposes* (now codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

> it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, *The Presidency* 30-31 (1916).

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. *See* 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915):

> [G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation. *Id.* at 472-73.
>
> . . .
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. *Id.* at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential

Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials—whether personal or official—which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the President of the United States." Section 507 (e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3] The corresponding provision of the current law, however, 44 U.S.C. 2107 (1), avoids the ambiguity. It envisions the President's deposit of *all* Presidential materials, not only personal ones. During the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents—Hoover, F.D. Roosevelt, and Harry Truman—have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1955).

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[3] Compare Section 507 (e) with Section 507 (a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office of Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 [131a] below.

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Governmental Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their personal property; and the congressional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." *Id.* at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one

assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times"—at least, what most people would reckon to be emoluments. Corwin, *The President* 348 N. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. *Id.* at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it—S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in

Folsom v. *Marsh, supra,* Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. § 793, obviously applies to Presidential papers even when they are within the possession of the former President.[4] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devoted to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946 *Matter of Roosevelt,* 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); *Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library* (1947) p. 1, Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar

[4] Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and the Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administra-

tion to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without more extensive factual and historical inquiry which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials; Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . . ." Fed. R. Crim. P. 16 (b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). *See, e.g., Couch* v. *United States,* 409 U.S. 322 (1973); Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir., 1956), *cert. denied,* 352 U.S 833; *United States* v. *Re,* 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be moved or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Attorney General

APPENDIX F

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, *et seq.*, all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.
2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.
3. I retain all legal and equitable title to the Materials, including all literary property rights.
4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108(f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.
6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.
7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:
   A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written

authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass

any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials

from loss, destruction, unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

/s/ RICHARD NIXON

Accepted by:

/s/ ARTHUR F. SAMPSON
Arthur F. Sampson
Administrator
General Services Administration

9/7/74

APPENDIX G

Richard NIXON, Petitioner,

v.

Hon. Charles R. RICHEY, United States District Court for the District of Columbia, Respondent.

No. 75–1063.

United States Court of Appeals,
District of Columbia Circuit.

Jan. 31, 1975.

Before ROBINSON and WILKEY, Circuit Judges.

ORDER

On consideration of petitioner's petition for writ of mandamus, for expedited consideration thereof, and of the responses by the parties, to the petition, it is

Ordered by the Court that the aforesaid petition is denied for the reasons and on the conditions stated in the attached *Per Curiam* opinion.

PER CURIAM:

On December 20, 1974, petitioner brought suit in the District Court to enjoin enforcement of the Presidential Recordings and Materials Preservation Act, Pub.L. No. 93–526, 88 Stat. 1695 (1974). That Act undertakes to provide for governmental retention of the Presidential materials of petitioner, including the White House tape recordings. Simultaneously with the filing of the complaint, petitioner applied for the convening of a three-judge court pursuant to 28 U.S.C. § 2282 (1970). The respondent District

Judge, to whom the case was assigned, has not yet ruled on this application.

When the Act was passed and when petitioner filed suit to enjoin its operation, three consolidated cases were pending before the District Judge, all of which addressed disposition of the Presidential materials. The Judge is about to rule on the merits of these three cases and thereby to resolve, at the least, issues as to ownership of the materials and privilege against their disclosure. It appears that at least these two issues are common to the consolidated cases and the suit to enjoin execution of the Act.

On January 28, 1975, petitioner filed in this court a petition for a writ of mandamus. The petition asks that we direct the District Judge to act immediately upon the pending application for a three-judge court, in accordance with 28 U.S.C. § 2284 (1970), and further direct advancement of the case to which it relates on the Judge's calendar in preference to the three consolidated cases as assertedly required by section 105(a) of the Recordings and Materials Act.

Section 2282 provides that a suit to enjoin enforcement of an act of Congress on grounds of federal unconstitutionality be heard and determined by a district court of three judges. An application for the convening of such a court is statutorily entitled to expeditious treatment: "[o]n the filing of the application, [the district judge] shall *immediately* notify the chief judge of the circuit . . .." 28 U.S.C. § 2284(1) (1970) (emphasis supplied). In Svejkovsky v. Tamm, 117 U.S. App.D.C. 114, 326 F.2d 657 (1963), we

held that a district judge erred in staying proceedings in such a case pending the outcome of a Supreme Court case raising the same or similar issues, instead of expeditiously deciding whether to proceed to convene a three-judge court. We stated that "[i]f such a stay is deemed proper here, under § 2284 it should, in any event, be granted by the court of three judges, and not by the single judge who is required to initiate the three-judge proceedings." *Id.* at 115, 326 F.2d at 658. It is to be noted that in *Svejkovsky* the district judge delayed (1) in response to a motion by the Secretary of State, (2) awaiting illumination from the Supreme Court, not from his own pen, and (3) did so in a matter in which there was no statute on the substantive issue involved requiring priority treatment.

Beyond these considerations, the Recordings and Materials Act independently supports petitioner's claim that the District Judge should have acted weeks ago on the three-judge application. Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title," and specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring *immediate* consideration and resolution . . .." (emphasis supplied) It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring

immediate consideration and resolution . . .." In these views, we need not consider contentions by one of the amici curiae that Sections 2282 and 2284 are inoperable in the situation at bar.

The District Judge's response in this court recites his diligence with regard to "the case" and his efforts to "move *it* to a conclusion" (emphasis supplied). The response informs us that "[t]he foregoing litigation, which consumes more than a complete legal-sized file drawer of pleadings, briefs and memoranda of law, has had the constant and almost daily attention of the Court since its inception, ... In fact, two weekends and the Christmas recess were entirely spent right here in this Courthouse working on this very matter." It is apparent, however, from the context and from the 49 pages of docket sheets filed as exhibits, 46 of which deal with the consolidated cases and only three of which deal with the case in which the three-judge court is requested, that the District Judge's efforts have been devoted stupendously to the case in which he is sitting as a single judge, but only meagerly to the requested three-judge court case challenging the constitutionality of the statute inexorably involved in the consolidated cases.

The record discloses beyond peradventure that the District Judge's plan was to complete work on and decide the consolidated cases before taking up the case attacking the Act. This is evident not only from his disproportionate allocations of time and effort but also from a letter he sent to counsel on January 23, 1975. In relevant part the letter stated:

> Due to unforeseeable circumstances, the court's opinion in the consolidated cases is not finished at this time. Until this opinion and order are finished, and the court is hopeful of having it done early next week, the court will not be able to turn its attention to the above-entitled cause. That will be the next order of business.

This plan presents problems beyond even the long overdue consideration of petitioner's three-judge request. Section 105(a) of the Act distinguishes the treatment to be given "challenges to the legal or constitutional validity of this title," on the one hand, and "any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in [the Act] or involving payment of any just compensation which may be due in connection therewith." The section then specifies, not only that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution," as previously discussed, but also that "such challenge shall have priority on the docket of such court over other cases." We have said that the case wherein petitioner seeks a three-judge court was a "challenge" within the contemplation of Section 105(a). We now add that as such it was entitled to priority over the consolidated cases—"other cases" because plainly "action[s] . . . involving the question of title, ownership, custody, possession, or control of" materials embraced within the Act.

Particularly in view of the issues common to all cases, and as well the obvious

bearing of the Act on all cases, if valid, decision of the consolidated cases at this time could compound the difficulties. For if it should later be determined that petitioner's "challenge" must be heard and decided by a court of three judges, that court will be confronted by decisions of a single judge on some of the issues the three judges are summoned to consider. The interests of justice would seem to require that disposition of the consolidated cases be held up at least until until the three-judge question is put to rest. All matters such as petitions to intervene, delay in the issuance of the opinion in the consolidated cases, etc., should properly be settled by the three-judge court.

We recognize and applaud the prodigious effort the District Judge made to dispose of the consolidated cases. But as worthy as it is, it cannot justify departure from the statutory mandate that there be "immediate consideration and resolution" of petitioner's "challenge" to the validity of the Act. Nor does there seem to be any reason why that mandate cannot be observed at once. The District Judge's response states his intention "to press [petitioner's] claim to a conclusion as fast as possible consistent with the ends of justice and convenience of all concerned." The first step in this would be either to convene a three-judge court, requested of the Judge six weeks ago today, or to decide that no three-judge court is called for, a decision which would be immediately appealable by petitioner to this court. We intimate no view as to what in this regard the District Judge should decide. We hold only that he must decide, and decide now.

The propriety of mandamus in the circumstances presented here is undoubted. Svejkovsky v. Tamm, *supra*, 117 U.S. App.D.C. at 115, 326 F.2d at 658. No final action on the petition at hand is necessary, however. We assume that the District Judge, now advised of the relevant law, will proceed in accordance with this opinion. Compare Fine v. McGuire, 139 U.S.App.D.C. 341, 344, 433 F.2d 499, 502 (1970); Reed Enterprises v. Corcoran, 122 U.S.App.D.C. 387, 392, 354 F.2d 519, 524 (1965); Svejkovsky v. Tamm, *supra*, 117 U.S.App.D.C. at 115, 326 F.2d at 658.

An appropriate order will issue.

APPENDIX H

Richard NIXON, Petitioner,

v.

Honorable Charles R. RICHEY, United States District Court for the District of Columbia, Respondent.

No. 75–1063.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 1, 1975.

Decided Feb. 14, 1975.

Before BASTIAN, Senior Circuit Judge, and ROBINSON and WILKEY, Circuit Judges.

PER CURIAM:

Petitioner filed in this court a petition for a writ of mandamus directing a District Judge to immediately grant a pending application for a three-judge court to hear and determine a case challenging the constitutionality of an act of Congress, and instructing the judge to give that case priority over three consolidated cases pending before him as a single judge. In a prior opinion,[1] we held that the judge had to rule on the three-judge application and had to defer the priority question to the three-judge court if convened. We denied the requested writ, however, as unnecessary to compliance with those holdings.

The judge's subsequent release of an opinion, without accompanying order, deciding the consolidated cases has prompted petitioner to seek reconsideration of our earlier refusal of a writ. A three-judge court has now been convened to

1. Nixon v. Richey, 168 U.S.App.D.C. —, 513 F.2d 427 (1975).

initially determine whether it properly should pass on the constitutional challenge, and no further action by us is needed in that regard. Since we had, however, stayed entry of any order implementing the opinion in the consolidated cases, the present controversy relates to whether the stay should be continued.

We find that our stay must remain in effect temporarily for protection of the litigation in which the challenge is made. We leave, as we did before, resolution of the priority question for the three-judge court if it rules that it is to function in that case. Our stay will terminate when the exigencies demanding it disappear. Our reasons for these decisions follow.

I

On December 19, 1974, the Presidential Recordings and Materials Preservation Act[2] became law. Title I of the Act directs the Administrator of General Services to obtain possession and control of specified tape recordings of conversations held, and other historical matter generated, during petitioner's tenure as President of the United States.[3] These the Administrator is to protect and preserve, subject to regulations to be promulgated to govern access by petitioner, governmental agencies and departments,

2. Pub.L. No. 93–526, 88 Stat. 1695 (1974).

3. Presidential Recordings and Materials Preservation Act § 101, 88 Stat. 1695 (1974).

and members of the public.[4] The Act also authorizes payment of just compensation upon a judicial finding that any individual has been deprived of private property by any provision of Title I.[5]

On the day after the Act went into effect, petitioner brought an action in the District Court to enjoin its enforcement permanently on grounds that it transgressed the Federal Constitution.[6] At the same time, petitioner asked that a three-judge court be convened to hear and determine the constitutional claims asserted therein.[7] The case was assigned to the respondent District Judge, the

4. *Id.* §§ 101 to 104, 88 Stat. 1695 (1974). The presidential materials are made amenable to judicial process and available for use in any judicial proceeding, subject to any rights, defenses or privileges the Federal Government or any individual may invoke, with priority to any request therefor by the Office of Watergate Special Prosecution Force. *Id.* § 102(b), 88 Stat. 1696 (1974). Petitioner or his designee is granted access to the materials for purposes consistent with the provisions of Title I, subsequent and subject to the Administrator's regulations. *Id.* § 102(c), 88 Stat. 1696 (1974). Governmental agencies and departments in the Executive Branch are also allowed access subject to the regulations. *Id.* § 102(d), 88 Stat. 1696 (1974).

5. *Id.* § 105(c), 88 Stat. 1698 (1974).

6. Nixon v. Administrator of Gen. Servs., Civ. No. 74–1852 (D.D.C.), filed Dec. 20, 1974.

7. See 28 U.S.C. §§ 2282, 2284 (1970).

Honorable Charles R. Richey, before whom three consolidated cases involving the presidential materials were then pending.[8] The contest in those cases extended to ownership of the materials and privilege against their disclosure, issues also involved in petitioner's constitutional challenge.[9] On January 3, 1975, petitioner moved for a preliminary injunction against operation of the Act.

During the five weeks following institution of the challenge case on December 20, petitioner—on five separate occasions, we are told—requested Judge Richey to initiate the statutory procedure leading to the formation of a district court of three judges.[10] The record re-

8. Nixon v. Sampson, Civ. No. 74–1518 (D.D.C.), filed Oct. 17, 1974; Reporters Comm. for Freedom of the Press v. Sampson, Civ. No. 74–1533 (D.D.C.), filed Oct. 21, 1974; and Hellman v. Sampson, Civ. No. 74–1551 (D.D.C.), filed Oct. 24, 1974.

9. Contentions petitioner advances in the challenge case are predicated upon his own assumptions as to ownership of and privilege respecting the presidential materials.

10. See 28 U.S.C. § 2284(1) (1970).

[illegible] during that period Judge Richey was preoccupied with the consolidated cases,[11] and planned to complete work on them before addressing the challenge case.[12] On January 23, 1975, Judge Richey informed counsel by letter that:

11. In a response submitted to the petition for mandamus, Judge Richey stated that the consolidated litigation "consumes more than a complete legal-sized file drawer of pleadings, briefs and memoranda of law," and "has had the constant and almost daily attention of the Court since its inception. . . ." "In fact," he added, "two weekends and the Christmas recess were entirely spent right here in this Courthouse working on this very matter." The record discloses that in contrast to his diligent efforts in the consolidated cases, Judge Richey devoted virtually no attention to petitioner's suit challenging the validity of the Act.

12. When the Act was signed into law and the challenge suit was filed, motions for a preliminary injunction were pending in the consolidated cases. On October 31, Judge Richey had denied petitioner's motion to consolidate hearings on these motions with trial on the merits, but on November 15, at a hearing on the motions, he had indicated that he might prefer to rule on the merits rather than solely on the issue of preliminary injunctive relief. After passage of the Act, Judge Richey decided upon complete resolution of the consolidated cases, and at his invitation several parties moved for full or partial summary judgment.

> Due to unforeseeable circumstances, the court's opinion in the consolidated cases is not finished at this time. Until this opinion and order are finished, and the court is hopeful of having it done early next week, the court will not be able to turn its attention to the above-entitled cause. That will be the next order of business.[13]

Late in the afternoon of January 28, petitioner filed in this court a petition for a writ of mandamus directing Judge Richey to grant the application for a three-judge court immediately and give the challenge case priority over the consolidated cases.[14] The petition called attention to Judge Richey's letter and its indication that the decision in the consolidated cases was imminent. Recognizing the possible consequence of that action upon petitioner's constitutional challenge, a matter we elucidate later,[15] we gave the matter all the expedition we

13. The letter was written to inform counsel of cancellation of a hearing previously scheduled on petitioner's motion for a preliminary injunction in the challenge case.

14. These requests rested upon 28 U.S.C. §§ 2282, 2284 (1970), and the Presidential Recordings and Materials Preservation Act § 105(a), 88 Stat. 1698 (1974).

15. See Part II, *infra*.

could command. On January 29, we called for responses,[16] by the close of the next day. We deliberated promptly after receipt of the responses, and filed an opinion and order on the morning of January 31.

In our opinion, we concluded that Judge Richey erred in delaying action on the three-judge request[17] and in ignoring the statutory priority[18] of the challenge case.[19] We held that Judge Richey "must decide and decide now," whether to call for a three-judge court,[20] stating carefully that "[w]e intimate[d] no view as to what in this regard [he] should decide."[21] On the matter of priority, we

16. See Fed.R.App.P. 21(b).

17. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 428–429.

18. "The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have pri-

19. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429.

20. *Id.* at —, 513 F.2d at 430.

21. *Id.*

pointed out the danger of first deciding the consolidated cases,[22] and observed that "[t]he interests of justice would seem to require that disposition of [those] cases be held up at least until the three-judge question is put to rest."[23] We noted specifically that "delay in the issuance of the opinion in the consolidated cases . . . should properly be settled by the three-judge court."[24]

Although thus concluding, and acknowledging the propriety of the mandamus remedy in the circumstances,[25] we saw no occasion for issuance of a writ. "No final action on the petition at hand is necessary," we stated;[26] "[w]e assume that the District Judge, now advised of the relevant law, will proceed in accordance with this opinion."[27] In so doing,

ority on the docket of such court over other cases." Presidential Recordings and Materials Preservation Act § 105(a), 88 Stat. 1698 (1974).

22. "Particularly in view of the issues common to all cases, and as well the obvious bearing of the Act on all cases, if valid, decision of the consolidated cases at this time could compound the difficulties. For if it should later be determined that petitioner's 'challenge' must be heard and decided by a court of three judges, that court will be confronted by decisions of a single judge on some of the issues the three judges are summoned to consider." *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

we adhered to a tradition inspired by a time-proven expectation that judges will perform their duties, once defined, without coercion by judicial process.[28] Correspondingly, our order accompanying the opinion denied a writ of mandamus "for the reasons and on the conditions stated in the" opinion.

We would be less than frank if we failed to observe that we did not anticipate the events which were soon to follow. Our opinion and order issued at approximately 9:45 a. m. on January 31. In line with our custom in expedited cases, our clerk's office telephonically notified Judge Richey at once, and minutes later copies of the opinion and order were hand-delivered to his chambers. At mid-afternoon of the same day, petitioner's motion for reconsideration of our denial of the writ of mandamus officially informed us that an opinion by Judge Richey in the consolidated cases[29] had

28. *E. g.*, Fine v. McGuire, 139 U.S.App.D.C. 341, 344, 433 F.2d 499, 502 (1970); Reed Enterprises v. Corcoran, 122 U.S.App.D.C. 387, 392, 354 F.2d 519, 524 (1965); Svejkovsky v. Tamm, 117 U.S.App.D.C. 114, 115, 326 F.2d 657, 658 (1963).

29. Nixon v. Sampson, 389 F.Supp. 107 (D.D.C. 1975).

been released at 11:00 a. m. The only explanation furnished us is that he had filed the opinion with his courtroom clerk shortly after 2:00 a. m. on that day.[30]

Judge Richey's opinion, a copy of which we later requested, stated that an order of even date would issue.[31] We acted to preserve the status quo by staying temporarily the effectiveness of any order that might have issued, and the entry of any orders in the consolidated cases. We also scheduled a special hearing on the day following, February 1, to better enable a determination as to whether the stay should be left in effect. At the hearing, we entertained argument not only for the parties to the challenge case, but also on behalf of others, as amici curiae, who are parties to the consolidated cases. We learned at the hearing that no order on Judge Richey's opinion had been entered.

30. The events just recited are discussed more fully in Part II, *infra*. The source of our information is two-fold. At 4:31 p. m. on February 12, Judge Richey filed in this court an unsolicited memorandum setting forth "the circumstances surrounding entry of [his] opinion in the consolidated cases . . . ." That memorandum appears as Appendix A to this opinion. We also incorporate, as Appendix B, a

31. Nixon v. Sampson, *supra* note 29, 389 F.Supp. at 160.

Subsequent to the hearing, on February 4, Judge Richey transmitted to us a report informing that on that date he had requested the Chief Judge of this circuit to convene a three-judge court to determine initially whether the challenge case should be heard and decided by such a court.[32] On the next day, the Chief Judge designated two judges to serve with Judge Richey as the court.[33] Thus the need for any further action on our part to activate the three-judge court machinery has disappeared. There remains, however, the question, extensively debated by the litigants, as to whether the stay should be continued; this question is explicitly presented by motions of some of the parties to vacate our stay.

II

[1] Manifestly, Judge Richey was obligated to abide any decision we might render on the petition for mandamus. "[A] lower court is bound to respect the mandate of an appellate tribunal;"[34] it "is without power to do anything which is contrary to either the letter or spirit

memorandum prepared by our First Deputy Clerk on January 31, listing, with time notations, relevant events through that date, from which we have deleted references to decisional action by this court not material to the problem involved in this case.

32. See 28 U.S.C. § 2284(1) (1970).

33. See *id.*

34. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 140, 60 S.Ct. 437, 440, 84 L.Ed. 656, 660 (1940). *See also* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168, 59 S.Ct. 777, 780–781, 83 L.Ed. 1184, 1188 (1939); Durant v. Essex Co., 101 U.S. 555, 556–557, 25 L.Ed. 961, 962 (1879).

of the mandate construed in the light of the opinion of [the] court deciding the case."[35] That we did not issue a writ of mandamus is beside the point. Our opinion set forth our views, the courses we held indicated, and why we deemed a writ unnecessary. Our order stated explicitly that the writ was denied "for the reasons and on the conditions stated in the" opinion.[36] The opinion as well as the order comprised our mandate,[37] and the opinion was to be consulted to ascertain what was required of Judge Richey.[38]

We cannot accept Judge Richey's explanation of his action[39] as ground for deviation from these well-settled principles. Disavowing the notion that he acted hastily to circumvent an adverse directive from this court,[40] he says in es-

35. Yablonski v. UMW, 147 U.S.App.D.C. 193, 195, 454 F.2d 1036, 1038 (1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1609, 31 L.Ed.2d 816 (1972), quoting Thornton v. Carter, 109 F.2d 316, 320 (8th Cir. 1940).

36. See text *supra* at notes 25–28.

37. See Fed.R.App.P. 41(a).

38. *See* Gulf Ref. Co. v. United States, 269 U.S. 125, 135, 46 S.Ct. 52, 53, 70 L.Ed. 195, 198 (1925); FTC v. Standard Educ. Soc'y, 148 F.2d 931, 932 (2d Cir. 1945); Ohio Oil Co. v. Thompson, 120 F.2d 831, 836 (8th Cir.), cert. denied, 314 U.S. 658, 62 S.Ct. 112, 86 L.Ed.2d 528 (1941).

39. App. A.

40. App. A at 449, 450, 451.

sence that having twice previously stated that he would complete the opinion by January 31,[41] he felt it imperative to do so.[42] That, he tells us, was why work on the opinion continued beyond 2:00 a. m. on that morning, and why the opinion was signed and filed in the District Court's clerk's office at that early hour for reproduction.[43] He adds that the opinion was publicly released at 11:00 a. m., notwithstanding knowledge of our opinion and order, because he "had *already acted* in the consolidated cases as promised."[44]

We note a significant variation between Judge Richey's statement and our First Deputy Clerk's careful record of the relevant facts, logged to the minute.[45] That variation is an omission in Judge Richey's version. While he states that he received our order in his chambers "[s]ome time after 10:00 a. m."[46] he neglects to mention that at precisely 9:50 a. m. he was telephonically advised that our order and opinion had been entered by the First Deputy Clerk, who read the order to him twice, emphasizing that a writ of mandamus had been denied only **"for the reasons and on the conditions stated in [the] attached"** opin-

41. In his letter to counsel, see text *supra* at note 13, and in his response to the petition for mandamus. App. A at 449–450.
42. App. A at 450.
43. App. A at 450.
44. App. A at 451 (emphasis in original).
45. App. B.
46. App. A at 451. But see App. B at 454–455.

ion.[47] The order and opinion were hand-delivered to Judge Richey's chambers between 9:45 a. m. and 9:55 a. m.,[48] and we see from Judge Richey's own statement that calls advising counsel of his ruling were not made until after 10:00 a. m.[49]

We note also the absence of any positive suggestion that Judge Richey's opinion had been entered on the civil docket when our opinion and order were received.[50] When his courtroom clerk was asked at what time the opinion was filed, she said "11:00 a. m."[51] It was two hours afterwards that she called our First Deputy Clerk to say that the opinion had been "filed" in the wee hours of the morning although not released until 11:00 a. m.[52] But irrespective of docketing, we deem the predawn "filing" of Judge Richey's opinion to be of no conceivable legal or practical effect. It is perfectly clear from his own statement that he had control of the opinion at 11:00 a. m., and that counsel were not notified of it until after Judge Richey had been verbally informed of our opin-

47. App. B at 454.
48. App. B at 454–455.
49. App. A at 451.
50. Fed.R.Civ.P. 79(a).
51. App. B at 455.
52. App. B at 455.

ion and order and had a copy of both in his hands.[53] It was his plain duty to abide that decision, and nothing in his statement provides good cause for not so doing.

[2] From January 28, when Judge Richey was served with a copy of the petition for mandamus, he knew that petitioner sought from this court a writ commanding, *inter alia*, priority of decision for the challenge case over the consolidated cases. From the fact that, on January 29, we called for responses to the petition on the very next day, he knew that we would not deny the petition out of hand,[54] and that we were proceeding speedily toward action on it. We think it clear that a judge is under a duty not to so circumstance himself as to be unable to conform to directives of a higher court which, from plain appearances, might be imminent. Irrespective of motivation, the course Judge Richey followed after learning of the mandamus proceeding[55] seems to have totally ignored that possibility.

53. App. A at 451. See also App. B. at 455.

54. See Fed.R.App.P. 21(b).

55. See text *supra* at notes 42–49.

[3] Even more fundamentally, priority in the filing-time as between Judge Richey's opinion and our order is unimportant to our decision, for in either event we have the responsibility of protecting affected litigants from possible harm. To insure justice for the litigants is invariably our overriding concern. The difficulty germinated by Judge Richey's action must now be brought under control and that may be undertaken within the framework of the present proceeding. "[M]andamus lies to rectify a deviation"[56] or "to correct a misconception of the scope and effect of the appellate decision."[57] To that task we now proceed, first defining the problem in terms of relevant statutory provisions.

[4] Congress has ordained that an action seeking an injunction against the enforcement of its legislation on grounds of federal unconstitutionality be heard and determined by a district court comprised of three judges.[58] Congress has also specified that "[o]n the filing of the application" for injunction, the district judge to whom it is presented "shall immediately notify the chief judge of the circuit"[59] and, further, that an application for a preliminary injunction in such

56. Yablonski v. UMW, *supra* note 35, 147 U.S. App.D.C. at 195, 454 F.2d at 1038. *See also* Will v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305, 310 (1967); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133, 89 L.Ed. 1566, 1572 (1945).

57. Yablonski v. UMW, *supra* note 35, 147 U.S. App.D.C. at 195, 454 F.2d at 1038, *See also* United States v. Haley, 371 U.S. 18, 19, 83 S.Ct.

58. 28 U.S.C. § 2282 (1970).

59. 28 U.S.C. § 2284(1) (1970).

an action—as petitioner sought here—"shall be given precedence and assigned for a hearing at the earliest practicable day."[60] We have previously held that in instances where a three-judge court is in order, the single judge must activate the three-judge machinery, and that any stay of three-judge proceedings which is proper may be granted only by the three judges.[61]

In our earlier opinion, we expressly refrained, as we do now, from deciding whether these particular provisions apply to the challenge case.[62] But in addition to these provisions, there is Section 105(a) of the Presidential Recordings and Materials Preservation Act,[63] which has evident bearing. As we stated in our earlier opinion,

> Section 105(a) of the Act confers upon the District Court for the District of Columbia "exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title,"[64] and

11, 9 L.Ed.2d 1, 2 (1962); In re Sanford Fork & Tool Co., 160 U.S. 247, 255, 16 S.Ct. 291, 293, 40 L.Ed. 414, 416 (1895).

60. 28 U.S.C. § 2284(4) (1970).

61. Svejkovsky v. Tamm, *supra* note 28, 117 U.S.App.D.C. at 115, 326 F.2d at 658.

62. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. —, 513 F.2d at 430.

63. See note 18, *supra*.

64. See note 18, *supra*.

> specifically provides that "[a]ny such challenge shall be treated by the court as a matter requiring *immediate* consideration and resolution . . . ."[65] . . . It is clear that the case for which petitioner sought the three-judge court was a "challenge to the legal or constitutional validity of" the Act. It is equally clear that, as an integral part of his "challenge," petitioner's application for such a court was "a matter requiring immediate consideration and resolution . . ."[66]

And we further stated:

> Section 105(a) of the Act distinguishes the treatment to be given "challenges to the legal or constitutional validity of this title,"[67] on the one hand, and "any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in [the Act] or involving payment of any just compensation which may be due in connection therewith."[68] The sec-

65. See note 18, *supra*.

66. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429.

67. See note 18, *supra*.

68. See note 18, *supra*.

tion then specifies, not only that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution," [69] . . . but also that "such challenge shall have priority on the docket of such court over other cases." [70] We have said that the case wherein petitioner seeks a three-judge court was a "challenge" within the contemplation of Section 105(a). We now add that as such it was entitled to priority over the consolidated cases—"other cases" because plainly "action(s) . . . involving the question of title, ownership, custody, possession, or control of" materials embraced within the Act.[71]

[5–7] In that opinion, we also took pains to alert Judge Richey to the peril of disposing of the consolidated cases ahead of the challenge case,[72] and to identify the nature of the peril.[73] Our reference obviously was to the doctrine of collateral estoppel,[74] which might bar petitioner from urging in the challenge case positions contrary to determinations which any decision of the consolidated

69. See note 18, *supra*.

70. See note 18, *supra*.

71. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d at 429–430.

72. See text *supra* at notes 22–24.

73. See note 22, *supra*.

74. See generally 1B J. Moore, Federal Practice ¶¶ 0.441 et seq. (1974).

cases might yield.[75] We reiterate that petitioner and his adversary in the challenge case were also parties to the consolidated cases, and that the issues of ownership and privilege in regard to the presidential materials were common to each. Adjudication of those issues in the consolidated cases, then, might foreclose antagonistic theories of ownership and privilege as bases for contentions in the challenge case.

75. Under the doctrine of collateral estoppel, a final judgment in a prior suit precludes relitigation of material issues decided therein. Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 U.S. 322, 326, 75 S.Ct. 865, 867, 99 L.Ed. 1122, 1127 (1955); Partmar Corp. v. Paramount Pictures Theatres Corp., 347 U.S. 89, 91, 74 S.Ct. 414, 416, 98 L.Ed. 532, 537 (1954); Southern Pac. R. R. v. United States, 168 U.S. 1, 48–49, 18 S.Ct. 18, 27, 42 L.Ed. 355, 377 (1897). The federal rule is that pendency of an appeal does not suspend the operation of a final judgment for purposes of collateral estoppel, except where appellate review constitutes a trial de novo. Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 188–189, 61 S.Ct. 513, 515, 85 L.Ed. 725, 729 (1941); Reed v. Allen, 286 U.S. 191, 199, 52 S.Ct. 532, 533, 76 L.Ed. 1054, 1057 (1932); 1B J. Moore, Federal Practice ¶ 0.416[3], at 2252 (1974). The majority of the states follow the same rule. *See* Denham v. Shellman Grain Elevator, Inc., 444 F.2d 1376, 1380 (5th Cir. 1971); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F.Supp. 499, 517 (E.D.Mich.1974); J. Moore, *supra*, at 2254. The prior judgment will support a claim of collateral estoppel even where it has been stayed pending appeal. Huron Holding Corp. v. Lincoln Mine Operating Co., *supra*, 312 U.S. at 189, 61 S.Ct. at 515, 85 L.Ed. at 729; J. Moore, *supra*, at 2252–53.

What we feared came to pass. Judge Richey's decision in the consolidated cases rejects petitioner's premises on ownership and privilege.[76] If ordered into effect, petitioner says, the decision will prevent him from presenting to the three-judge court substantial arguments in support of his challenge to the constitutional validity of the Act, and for that reason he asks that the stay be continued. So it is that, on the stay matter, the question of priority as between the challenge case and the consolidated cases comes to the fore.

While, as noted,[77] in our previous opinion we discussed the facial indications of Section 105(a)'s priority provision, we felt that resolution of the priority issue was for the three-judge court,[78] and we now adhere to that view. Because, however, it is strenuously argued that the priority provision does not justify any further stay, we have reexamined the provision in light of its legislative history to ascertain how strong the possibility is

76. Nixon v. Sampson, *supra* note 29, 389 F.Supp. at 133–145, 147–153.

77. See text *supra* at note 18.

78. Nixon v. Richey, *supra* note 1, 168 U.S.App. D.C. at —, 513 F.2d 429–430.

that the priority provision means just what it appears to say.[79] We turn now to the results of that reinvestigation.

III

The history of the Presidential Recordings and Materials Preservation Act portrays vividly the congressional view that legislation as to the presidential materials was needed importantly and urgently, and, as well, that questions as to the validity of such legislation should be considered and resolved by the courts expeditiously. On September 8, 1974, President Ford announced that petitioner and the Administrator of General Services had negotiated and executed an agreement—the "Nixon-Sampson agreement"—conferring control of the materials upon petitioner.[80] Both Houses of Congress were concerned about the potential consequences of that agreement in terms of continuing availability of and

79. Our function in this regard approximates the function leading to an estimate of the probability of success on the merits when a litigant moves for a stay pending appeal. Here we undertake only to gauge probabilities, leaving the ultimate decision where it properly belongs.

80. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–4 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 3 (1974).

access to the presidential materials.[81]

81. The Senate Committee on Government Operations explained:

> The net effect of [the] provisions [of the Nixon-Sampson agreement] is to place the tape recordings in imminent danger of destruction. In the event of Mr. Nixon's death, all the tapes would have to be destroyed. The agreement also requires the Office of Special Watergate Prosecution Force, as well as any other litigant, to file with Mr. Nixon any request for access to the tapes and other materials. This, in turn, raises the strong possibility that the prosecution of the Watergate crimes could be marked by protracted delays in obtaining evidence, since it is quite possible that Mr. Nixon might resist some or perhaps all of that Office's requests for information. Moreover, the agreement suggests that Mr. Nixon, or his designees, could start destroying all the papers and materials (other than the tapes) by 1977.
>
> The ultimate destruction of the tapes, coupled with the difficulties in obtaining access to the other Nixon materials, would be a fundamental violation of public policy. To begin with, prosecutors, defendants, and the courts probably would be deprived of crucial evidence bearing on the defendants' innocence or guilt of the Watergate crimes for which they stand accused. Moreover, the American people would be denied full access to all facts about the Watergate affair, and the efforts of Congress, the executive branch, and others to take measures to prevent a recurrence of the Watergate affair may be inhibited. The Nixon-Sampson agreement, then, bears not only on our system of justice; it also bears on the viability of our constitutional system of government.

S.Rep.No. 93–1181, 93d Cong., 2d Sess. 4 (1974).

The House Committee on House Administration had this to say:

> . . . the agreement gives Mr. Nixon total control over all the materials and records of his Administration. It allows him to have access to the materials but excludes others from reviewing these records. By allowing Mr. Nixon to destroy all of the materials, the agreement ignores the public interest in preserving them. It ignores the legitimate continuing need for these materials in many judicial proceedings, including some in which U. S. law enforcement will be frustrated and individual rights impaired if the materials are unavailable to the courts. It ignores the needs of Congress and executive agencies for continued use of the documents in the process of government. And it ignores the needs of historians, political scientists, and other scholars for the information these materials contain on the events of recent years and the workings of our government.

H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 3 (1974).

In both Houses bills were promptly introduced, and they had as their purpose alteration of the Nixon-Sampson arrangement to invest the Federal Government with control over the materials, and thereby with power to protect them and provide for access. The Senate bill, introduced on September 18,[82] critical features of which we later discuss,[83] passed that body on October 4[84] and, with minor variations, the House on December 3.[85] Following amendments by the Conference Committee,[86] both Houses, on December 9, enacted the measure into law.[87] Thus Congress achieved the goal of expediting passage of legislation on the matter of the presidential materials.

82. 120 Cong.Rec. S 16870 (daily ed. Sept. 18, 1974).

83. See text *infra* at notes 88–92.

84. 120 Cong.Rec. S 18336 (daily ed. Oct. 4, 1974).

85. 120 Cong.Rec. H 11212 (daily ed. Dec. 3, 1974).

86. 120 Cong.Rec. H 11442 (daily ed. Dec. 9, 1974).

87. 120 Cong.Rec. S 20809, H 11445 (daily ed. Dec. 9, 1974).

The second congressional goal—speedy determination of possible challenges to the validity of the Act—was initially approached by insertion of an express provision on that subject in the Senate bill. In the form in which it first passed both Houses, the bill specifically provided that:

> The Federal District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of any provision of this Act or of any regulation issued under the authority granted by this Act. Such challenge shall be heard by a three-judge court constituted under the procedures delineated in section 2284, title 28 of the United States Code, with the right of direct appeal to the United States Supreme Court. Any such challenge shall be treated by the three-judge court and the Supreme Court as a priority matter requiring immediate consideration and resolution.[88]

When the Senate first considered the measure, Senator Ervin, one of its sponsors, commented that

> [t]his legislation, of course, may be subject to legal or constitutional challenges. In light of this possibility, the final principal provision states that all such challenges shall be heard on an expedited basis by a three-judge court, with direct appeal to the Supreme Court. In this way, all legal and constitutional issues can be resolved quickly.[89]

Senator Javits, another sponsor, stated that the bill

> vests in the U.S. District Court for the District of Columbia exclusive jurisdiction to hear challenges to the legal or constitutional validity of any provision of this act. It provides further that such challenges shall be heard by a three-judge court, with the right of appeal to the U.S. Supreme Court, and requires that such challenges be treated by both courts as priority matters to be given immediate consideration and resolution.[90]

And Senator Nelson, still another sponsor, pointed out that

> [t]his bill provides an expedited procedure to test any question of the invasion of anybody's rights. . . . It requires a three-judge circuit [*sic*] court to have the matter treated as a priority issue, and then appeal to the Supreme Court.[91]

88. 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

89. 120 Cong.Rec. S 18236 (daily ed. Oct. 3, 1974).

90. 120 Cong.Rec. S 18239 (daily ed. Oct. 3, 1974).

91. 120 Cong.Rec. S 18327 (daily ed. Oct. 4, 1974).

Similarly, in the House, Representative Brademas, the floor manager of the bill in that body, explained to his colleagues that

> [t]o insure expeditious resolution of any challenge to the legal or constitutional validity of any provision of this title, the bill provides that any such challenge shall be heard by a three-judge panel of the U.S. District Court for the District of Columbia with a direct appeal to the U.S. Supreme Court. The bill further provides that any challenge and appeal shall be heard as a priority matter.[92]

Another manifestation of how urgent Congress deemed the enactment of legislation to deal with the presidential papers is found in the statutory scheme itself. Throughout the reports and debates on the bills which eventuated into the Act, Congress repeatedly made it plain that it considered the question of ownership of the materials to be a subject for judicial decision rather than legislation.[93] It believed, however, that the situation demanded legislation *immediately*, without awaiting judicial determination of the question of ownership,[94] and further believed that legislation could appropriately be framed to meet the emergency the Nixon-Sampson

92. 120 Cong.Rec. H 11208 (daily ed. Dec. 3, 1974).

93. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–5 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 4–5 (1974).

94. See S.Rep.No. 93–1181, 93d Cong., 2d Sess. 4–5 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 5 (1974).

agreement portended, without a resolution of that question, simply by making provision for the payment of just compensation for such materials as the courts might later determine was due.[95] As the report of the Committee on Government Operations elucidates:

> If the materials are public property, the Congress is merely exercising its powers under Article IV of the Constitution to dispose of public property.
>
> If the materials are private property, then the Congress is merely taking "protective custody" of them for critically important public business
>
> . . . .
>
> If a court should decide that the legislation would in any way deprive Mr. Nixon, or anyone else, of private property, provision is then made to have him paid just compensation for the loss of any such property right. The payment of such just compensation will render any "taking" under the legislation as constitutional.[96]

95. S.Rep.No. 93–1181, 93d Cong., 2d Sess. 3–4 (1974); H.R.Rep.No. 93–1507, 93d Cong., 2d Sess. 5 (1974).

96. S.Rep.No. 93–1181, 93d Cong., 2d Sess. 5–6 (1974). See also, to the same effect, H.R.No. 93–1507, 93d Cong., 2d Sess. 7 (1974).

So it was that the Act, with relatively minor differences in text, passed both Houses of Congress.[97] It was only thereafter, but at some time prior to action by the Conference Committee on the differences between the Senate and House versions, that the pendency of the consolidated cases before Judge Richey assumed a role. In conference, the three-judge court requirement was eliminated, and the measure, with Section 105(a), in its present form,[98] was approved by the Committee[99] and subsequently accepted by both houses.[100] The only explanation for this action is found in remarks by

Representative Brademas when the action of the Conference Committee came on for consideration by the House. Representative Brademas explained:

97. 120 Cong.Rec. S 18336 (daily ed. Oct. 4, 1974); 120 Cong.Rec. H 11212 (daily ed. Dec. 3, 1974).

98. See note 18, *supra*.

99. See 120 Cong.Rec. H 11443 (daily ed. Dec. 9, 1974).

100. See 120 Cong.Rec. S 20809, H 11445 (daily ed. Dec. 9, 1974).

These amendments combine two sections in the House-passed measure—sections 103 and 106—to make clear that the U.S. District Court for the District of Columbia shall have exclusive jurisdiction to hear all challenges to this legislation, including challenges to the legal and constitutional validity of this title and any challenge regarding the question of title, custody, possession or control of these tapes and materials and the payment of "just compensation" which may be required. The amendment also deletes the provision for a three-judge court with direct appeal to the Supreme Court. This amendment would thereby enable a single judge of the U.S. District Court for the District of Columbia to hear any challenge to this legislation. The amendment provides that any challenges to this legislation receive priority consideration and that all appeals be heard on an expedited basis.

This amendment would allow for an expeditious review of any legal challenge to this legislation. There is now pending before a single-judge District Court for the District of Columbia a proceeding in which the major issues have already been briefed and argued and in which the major parties are present. Under the amendment, the pleadings in the pending litigation could be amended to take into account additional issues regarding the validity of the legislation and the United States could be added as a defendant to any claim for compensation by Mr. Nixon.

. . . The new "judicial review" section, section 105, would provide that any challenge to this legislation could be considered as part of litigation which is now pending in the U.S. District Court for the District of Columbia. Since most of the issues in this litigation have been fully briefed and competently argued, and since the issues in any challenge to this litigation will be essentially the same, the public interest will be fully represented. And, if it becomes apparent that a particular point may not be adequately represented, the judge presiding over such litigation could appoint an amicus curiae to argue these points.[101]

The remarks of Representative Brademas demonstrate that Congress intended to preserve single-judge jurisdiction over the consolidated cases, even for consideration and decision of challenges to the constitutional validity of the new Act in the event that such challenges were asserted in those cases. The remarks plainly contemplated, too, that any such challenge would utilize that opportunity. But Representative Brademas was completely silent on the question whether such a challenge could only take that route, and so is the rest of the legislative history.

101. 120 Cong.Rec. H 11444 (daily ed. Dec. 9, 1974).

We need not ponder whether Congress could validly have imposed the requirement that such a challenge could only be entertained in the consolidated cases. Nowhere in the legislative history is there any suggestion that Sections 2282 and 2284 would not enable a separate suit presenting a constitutional challenge to the Act in the context of a demand for injunctive relief. It would have been simple for Representative Brademas to state, and indeed for Congress to require, that those sections would not apply to challenges to the Act, had that been what Congress had in mind. Neither, however, was done, and the courts are left with the problem of determining whether petitioner's separate-suit challenge requires the usual three-judge court, particularly in light of the general canon of construction that repeal of a statute by implication is disfavored.[102]

102. Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 89 S.Ct. 354, 358, 21 L.Ed.2d 334, 340 (1968); United States v. Zacks, 375 U.S. 59, 67-68, 84 S.Ct. 178, 183, 11 L.Ed.2d 128, 134 (1963); Silver v. New York Stock Exchange, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389, 400 (1963).

It is much the clearer, however, that Congress deemed indispensable to its objectives the immediate consideration and resolution of any challenge to the constitutional or legal validity of any provision of the new Act. It was to mandate that degree of expedition that each of the bills initially passing the Senate and the House contained the requirement that such challenges be heard and determined by a three-judge court, with direct appeal to the Supreme Court,[103] and contained also the requirement that both courts proceed immediately to consider and resolve the challenges.[104]

It was because, thereafter it came to the attention of Congress that the consolidated cases were pending before Judge Richey and, in the understanding of Congress, had proceeded to the point of briefing of many of the questions related to the validity of the Act, that the Conference Committee decided to leave it possible to utilize that litigation as the vehicle for speedy resolution of challenges to the validity of the Act[105] in-

103. See 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

104. See 120 Cong.Rec. S 18234 (daily ed. Oct. 3, 1974).

105. See text *supra* at note 101.

stead of *requiring* a three-judge court. In sum, because of the progress Congress assumed the consolidated litigation had already made to that point, it was felt that expedition could be promoted if, in lieu of providing for a new suit before a three-judge court—which would have to start from a new beginning—the progress already achieved in the consolidated cases could be capitalized on.

But what Congress expected, and what Section 105(a) as enacted would permit, was that any and all challenges to the validity of the Act would be made in the consolidated cases before Judge Richey as a single judge, after appropriate amendments and additions of parties for that purpose were accomplished.

What Congress apparently did not anticipate was that petitioner, instead of pursuing that route, would institute a new, separate suit grounded on Sections 2282 and 2284 to test in orthodox fashion the constitutionality of the Act before a three-judge rather than a single-judge tribunal.

There is yet another important consideration and it indicates strongly that Congress intended that questions affecting the constitutional validity of the Act should be considered and completely resolved prior to any decision of other issues pertaining to the presidential materials. The Act, on its face, provides a comprehensive scheme for control, preservation and utilization of the presidential materials in the manner found to be best suited to the needs of the Federal Government and the American public.

It requires the Administrator of General services to "receive, obtain, or retain, complete possession and control of all original tape recordings of" designated conversations,[106] and "of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974."[107] It provides specifically that "[n]one of the tape recordings or other materials . . . shall be destroyed, except as" Congress may later provide;[108] that the materials are immediately available, on a priority basis, to the Special Watergate Prosecution Force for use in judicial proceedings;[109] that petitioner or his designee shall have access to the materials for purposes consistent with the Act, subsequent and subject to regulations the Administrator is required to promulgate;[110] and that agencies and departments in the Execu-

106. Presidential Recordings and Materials Preservation Act, § 101(a), 88 Stat. 1695 (1974).

107. *Id.* § 101(b)(1), 88 Stat. 1695 (1974).

108. *Id.* § 102(a), 88 Stat. 1696 (1974).

109. *Id.* § 102(b), 88 Stat. 1696 (1974).

110. *Id.* § 102(c), 88 Stat. 1696 (1974).

tive Branch shall have access to the materials subject to such regulations.[111] The Administrator is required to promulgate a set of regulations "as may be necessary to assure the protection of the" materials "from loss or destruction, and to prevent access to such" materials "by unauthorized persons,"[112] the regulations within ninety days after enactment to be submitted to both Houses of Congress and to become effective ninety legislative days following submission unless disapproved by a resolution adopted by either House during such period.[113] In promulgating the regulations, the Administrator is required to take into account a great variety of factors bearing on the relative needs of government, the public, litigants and petitioner to controlled access to the materials.[114]

111. *Id.* § 102(d), 88 Stat. 1696 (1974).

112. *Id.* § 103, 88 Stat. 1696 (1974).

113. *Id.* § 104(a), (b)(1), 88 Stat. 1696, 1697 (1974).

114. *Id.* § 104(a)(1)–(7), 88 Stat. 1696–97 (1974).

It is thus seen that Congress fashioned the Act to cover a wide territory. Once the Administrator has fashioned regulations which do not incur congressional disapproval the interests of all will be carefully and comprehensively regulated.[115] It must be noted, too, that the regulatory process is to continue indefinitely into the future, with revisions of regulations from time to time as may be needed.[116] If only the Act and the implementing regulations are valid, Congress will have settled questions about the materials on a very broad scale.

It may well be wondered how much, if anything, will be left unregulated by the Act and the regulations; in other words, what else, if anything, a court will have to pass upon, aside from disputes over access to the materials *under* the legislatively- and administratively-established criteria, and questions of just compensation for takings essential to enable gov-

115. The Act expressly leaves unaffected rights, limitations and exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* (1970). Presidential Recordings and Materials Preservation Act, § 104(d), 88 Stat. 1698 (1974). This means, of course, that both statutes, together with the regulations, would supply the governing rule for all cases.

116. See Presidential Recordings and Materials Preservation Act, § 104(b)(3), 88 Stat. 1697 (1974).

ernmental retention and control.[117] In any event, to the extent that Congress and the Administrator of General Services validly define the rights and interests of those to whom the materials are subjects of concern, judicial decisions on those subjects might well be unnecessary and meaningless. All this would seem to suggest that what Congress contemplated, and what congressional specifications in Section 105 mean, is that questions of validity of the Act's provisions would be decided ahead of other questions.

This review of the Act's legislative history, we think, lends clarity to the priority features of Section 105(a). The essence of the legislative lesson may be briefly summarized. Section 105(a) sharply distinguishes between "challenges to the . . . constitutional validity of" Title I of the Act,[118] like petitioner's constitutional attack, and actions involving questions "of title, ownership, custody, possession, or control of" the presidential materials, like the consolidated cases.[119] Section 105(a) then proceeds to specify that "[a]ny such challenge shall be treated by the court as a matter requiring immediate consideration and resolution"[120] and that "such

117. See note 115, *supra*.

118. See note 18, *supra*.

119. See note 18, *supra*.

120. See note 18, *supra*.

challenge shall have priority on the docket of such court over other cases." [121] As the text and legislative history, read together, make quite plain, what Congress wanted was speed in judicial handling of such "challenges," whether properly to be considered and determined by three judges or one.[122] Just as plainly, the text and history of Section 105(a) indicate that Congress did not share the same concern for speed in the resolution of litigation not amounting to a "challenge." That litigation is relegated to a position below the priority specified for "challenge" actions.

IV

Events subsequent to issuance of our stay order have mitigated somewhat the problem left in the wake of Judge Richey's released opinion in the consolidated cases. His call for a three-judge court and the designation of that court for petitioner's challenge case [123] have eliminated any pre-existing need for a stay pending consideration of those aspects of the litigation. There remains, however, the unsettled question of priority as between the challenge case and the consolidated cases. That is a matter retaining importance from the possible impact, upon presentation and treatment of constitutional contentions in the challenge case, of Judge Richey's determinations on ownership and privilege, in reference to the presidential materials, should they be ordered into operation.[124]

[8, 9] As we have stated, those determinations, once effective, may preclude petitioner from advocating in the challenge case any constitutional position hypothesizing ownership or privilege differently from Judge Richey's outcome on those scores.[125] By the same token, the three-judge court, convened to render a decision on the Act's constitutionality, might find itself unable to view the Act in light of conclusions on ownership and privilege variant from Judge Richey's, and conceivably unable to pass on the Act at all. We are mindful that the need for a three-judge court in the challenge case is still uncertain.[126] But it is

121. See note 18, *supra*.

122. See text *supra* this part.

123. See text *supra* at notes 32–33.

124. See Part II, *supra*. The priority question and the three-judge question are independent, and the question of priority remains whether a decision thereon is to be made by one judge or three. See text *supra* at notes 63–71.

125. See text *supra* at notes 73–76.

126. See text *supra* at notes 58–66.

clear enough that if that court is found to be jurisdictionally required, it must be indulged enough room to enable proper performance of the serious and difficult task of sound constitutional adjudication.[127] Three-judge business is for three judges, not just one,[128] and we cannot accept the notion that a single judge can unilaterally narrow the ambit

127. This is well illustrated by numerous holdings that, notwithstanding the factual conclusions of state courts, the Supreme Court on review has the duty of independently examining the facts and determining whether federal rights at stake have been violated. *See, e. g.*, Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6, 11, 90 S.Ct. 1537, 1540, 26 L.Ed.2d 6, 13 (1970); Whitus v. Georgia, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed.2d 599, 603 (1967); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546, 556 (1954); Niemotko v. Maryland, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267, 270 (1951).

128. Compare Svejkovsky v. Tamm, *supra* note 28, where we found error in the action of the district judge who, instead of promptly deciding whether to call for convocation of a three-judge court, stayed proceedings in the case pending decision by the Supreme Court of another case involving the same or similar issues. We said that "[i]f such a stay is deemed proper here, under § 2284 it should, in any event, be granted by the court of three judges, and not by the single judge who is required to initiate the three-judge proceedings." 117 U.S. App.D.C. at 115, 326 F.2d at 658.

of a three-judge tribunal.[129] We think,

129. It is argued that Judge Richey, as a single judge, could properly decide whether resolution of the consolidated cases should be deferred pending the outcome of the challenge case. The cases relied upon do not support that proposition. In Hagans v. Lavine, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974), the Court upheld the authority of a single judge to pass on a question of conflict between the state law under challenge and federal law before requesting a three-judge court. In Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 95 S.Ct. 289, 42 L.Ed.2d 249 (1974), the Court noted that a single judge could dismiss a constitutional challenge for lack of standing without asking for a three-judge court, despite the fact that such a court would otherwise be required. 419 U.S. at 99, 95 S.Ct. at 295, 42 L.Ed.2d at 258. *See also* Rosado v. Wyman, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1972). In these cases, the single judge did no more than the three-judge court would itself have been required to do—dispose of the litigation on non-constitutional grounds, if possible. In each, the ground for decision was "a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge." Gonzalez v. Automatic Employees Credit Union, *supra*, 95 S.Ct. at 295 (footnote omitted). Here, decision of the consolidated cases hardly had the capability of obviating the need for a three-judge decision on petitioner's challenge to the constitutionality of the Act. Moreover, while single-judge rulings on issues that might obviate the need for a three-judge court obviously promotes conservation of judicial resources, in the instant case Judge Richey apparently entertained no such purpose. If any resolution of the consolidated cases could conceivably have removed the necessity for convening a three-judge court, it was the resolution that Judge Richey fashioned in his opinion of January 31. Nevertheless, on February 5, Judge Richey requested the Chief Judge of the circuit to convene a three-judge court to determine whether

rather, that it is for the three-judge court to define its area of proper concern in the challenge case, and to ascertain for itself whether Judge Richey's action amounted to a preemption of its prerogatives, particularly under the priority specification of the Act.[130]

Had the three-judge court been convened promptly after the filing of the challenge case, it could have avoided the dilemma now confronting it. It could have adjudicated the priority question and, if its ruling favored priority for the challenge action, it could have enjoined the parties to the consolidated cases from proceeding further toward a decision on the merits.[131] But with the consolidated cases decided and lacking only an implementing order when the three-judge court came into being, there appears to be no method whereby that court might now implement any conclusion it might reach that the challenge case has priority.[132] Rather, the choice, as we see it, is between a stay of any order effectuating Judge Richey's decision in the consolidated cases until the

a three-judge court was required to hear the challenge to the Act. See text *supra* at note 13.

130. See note 18, *supra*, and Part II, *supra*.

131. Speed Prods. Co. v. Tinnerman Prods., Inc., 83 U.S.App.D.C. 243, 245–246, 171 F.2d 727, 729–730, (1948); Small v. Wageman, 291 F.2d 734, 735 (1st Cir. 1961); Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F.2d 1012, 1014 (2d Cir. 1944). Restraint of the parties is not tantamount to restraint of the court. Steelman v. All Continent Corp., 301 U.S. 278, 290–291, 57 S.Ct. 705, 710, 81 L.Ed. 1085, 1093 (1937).

132. See text *supra* at notes 73–76.

three-judge court can decide the priority question and proceed accordingly, on the one hand, and relegating that question to an appeal from Judge Richey's decision, to be made possible by dissolution of the stay and entry of an order on the opinion.[133] The choice is thus thrust upon us, and the question is which of the two courses open to us is best calculated to serve the interests of the litigants and the litigations. We settle upon the stay route in lieu of the appeal route.

[10] The route by an appeal in the consolidated cases—with adjudication of the priority issues before examination of the merits, to speed resolution—has some attractions. We do not lightly stay judicial decisions which may in the long run turn out to be correct. Our stay will retard, for a while, the progress of an appeal from the decision in the consolidated cases. Additionally, the three-judge apparatus is not to be utilized freely, but only and strictly as Congress

133. The most desirable alternative would be referral of the stay question to the three-judge court. Since, however, an order acting only on the parties, see note 131, *supra*, could not delay an order on Judge Richey's opinion, and consequently could not prevent any collateral effect of the ownership-privilege determinations, it appears that the three-judge court no longer possesses the means of safeguarding the decisional realm to which it may be entitled.

has prescribed.[134] These considerations have been carefully weighed as we have deliberated on the two alternatives open to us.

In support of continuation of the stay, petitioner has suggested that its dissolution would greatly diminish his chances of reversing determinations adverse to his assertions of ownership of the presidential materials and privilege to shield them from outside scrutiny. Should the stay be lifted, petitioner's avenue for review of Judge Richey's conclusions on those issues would, of course, be the normal appeal of right to this court and, if necessary, an application to the Supreme Court for a writ of certiorari, the granting of which is discretionary. The suggestion is that with the stay viable and the three-judge court thus free to decide the ownership and privilege claims for itself, petitioner could appeal, as a matter of right, directly to the Supreme Court if the three-judge court rejected

134. *E. g.*, Mitchell v. Donovan, 398 U.S. 427, 431, 90 S.Ct. 1763, 1765, 26 L.Ed.2d 378, 382 (1970); Goldstein v. Cox, 396 U.S. 471, 478, 90 S.Ct. 671, 675, 24 L.Ed.2d 663, 669 (1970).

them.[135] We note, however, that petitioner could gain this supposed benefit only if the three-judge court denies a preliminary injunction, or by final order a permanent injunction, against enforcement of the Act;[136] should the court decide that the challenge action is not one requiring three judges,[137] or should it decide that the Act is unconstitutional but an injunction is unnecessary,[138] appellate review must begin in this court. And if, on a point short of federal constitutionality, injunctive relief should be refused, it is debatable whether a direct appeal to the Supreme Court would offer any advantage over the appellate path through this court.[139] Moreover, even aside from these possibilities, which we are in no position to gauge, there is the question whether in any event the supposed benefit for which petitioner strives is sufficient reason to warrant continuation of the stay.

135. Pursuant to 28 U.S.C. § 1253 (1970), it is assumed.

136. *See* Rockefeller v. Catholic Medical Center, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970); Goldstein v. Cox, *supra* note 134, 396 U.S. at 475, 90 S.Ct. at 674, 24 L.Ed.2d at 667–668; 9 J. Moore, Federal Practice ¶ 110.03[3], at 79–80 (1973).

137. Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83, 89 S.Ct. 60, 21 L.Ed.2d 215 (1968); Wilson v. Port Lavaca, 391 U.S. 352, 88 S.Ct. 1502, 20 L.Ed.2d 636 (1968); 9 J. Moore, Federal Practice ¶ 110.03[3], at 76–77 (1973).

138. *See* Mitchell v. Donovan, *supra* note 134, 398 U.S. at 430–431, 90 S.Ct. at 1765, 26 L.Ed.2d at 381–382; Rockefeller v. Catholic Medical Center, *supra* note 136; 9 J. Moore, Federal Practice ¶ 110.03[3], at 77–80 (1973).

139. In Gonzalez v. Automatic Employees Credit Union, *supra* note 129, the Court observed that "[w]hile issues short of the merits—such as justiciability, subject-matter jurisdiction, equitable jurisdiction, and abstention—are often

[11] We need not ponder further this suggestion or the factors favoring the appeal route over the stay route, for another factor dictates our conclusion. The stark truth of the matter is that either method could retard one of the two litigations—the consolidated cases surely by a stay, or the challenge case perhaps by collateral estoppel—and in this milieu we find guidance in what Congress has said and done. We have adverted to the provisions explicitly requiring "immediate consideration and resolution" of any challenge to Title I of the Act,[140] and "priority [of such challenge] on the docket of the [District] [C]ourt over other cases."[141] We have meticulously explored the Act's legislative history,[142] and there have seen the consummated effort to speedily enact this legislation,[143] and the congressional intent that challenges

of more than trivial consequence, that alone does not argue for our reviewing them on direct appeal," 419 U.S. at 99, 95 S.Ct. at 295, 42 L.Ed.2d at 258, and that "the courts of appeals might in many instances give more detailed consideration to these issues than this Court, which disposes of most mandatory appeals in summary fashion." *Id.* The Court added that it "typically disposes summarily of between ⅔ and ¾ of the three-judge court appeals filed each term," 419 U.S. at 99 n.17, 95 S.Ct. at 295 n.17, 42 L.Ed.2d at 256 n.17, and that "[i]t seems more than probable that many of these cases, while unworthy of plenary consideration here, would benefit from the normal appellate review available to single-judge cases in the courts of appeals." *Id.*

140. See text *supra* at notes 63–66.

141. See text *supra* at notes 67–71.

142. See Part III, *supra*.

143. See text *supra* at notes 80–87.

to its validity proceed through the courts with all possible expedition.[144] Utilization of the appeal route, as the means of dealing with Judge Richey's decisions on ownership and privilege in regard to the presidential materials, would delay consideration by the three-judge court of the full panoply of considerations affecting the constitutionality of the Act; it could, in practical effect, halt the work of the three-judge court until completion of appellate review of the consolidated cases in this court, and possibly in the Supreme Court. On the other hand, continuation of the stay would enable the three-judge court to proceed immediately to the priority issue without the limitations which Judge Richey's determinations may impose. In sum, only the stay route can preserve the possibility of "immediate consideration and resolution" of the challenge case on a basis of "priority . . . over other cases," while the appeal route would stand congressional purpose on its head. When this factor is placed on the scale, the balance clearly favors a continued stay.

Our stay is, of course, for the protection of the three-judge court, a protection it seemingly is unable to erect for itself. It is designed to place the parties in approximately the same positions they

144. See Part III, *supra*.

would have occupied had the three-judge and priority questions been given the early attention they deserved. The stay will remain in effect for as long, but only so long, as the three-judge court may need it. Now constituted, the court presumably will determine whether the challenge case is properly before a court of three judges and, if so, whether adjudication of that case should precede effectuation of Judge Richey's decision by entry of an order in the consolidated cases. Should the three-judge court answer either the three-judge question or the priority question in the negative, the occasion for the stay will end at that point, as it will whenever that court concludes on any other ground that the stay has served its purpose. Otherwise, the stay will endure until the three-judge court has rendered its decision on petitioner's constitutional challenge. Meanwhile, the court has but to make known its wishes in regard to the stay, and we will be prepared to honor them.

The motion for reconsideration of our earlier disposition of the mandamus petition is granted. The motions to vacate our stay are denied.[148] The stay will remain in effect until further direction by this court. An appropriate order will accompany this opinion.

148. In his motion asking this court to vacate our stay, the Special Prosecutor claims that his investigations will be hindered if the stay remains and prolongs the situation as it existed prior to release of Judge Richey's opinion because, he says, he lacks sufficiently broad access to the presidential materials. Petitioner's counsel represents, however, that petitioner "has not refused to provide the Special Prosecutor any specific item, including tape recordings, which the Special Prosecutor has requested." Moreover, while undoubtedly our stay provides narrower access than the Special Prosecutor sought in the consolidated cases, the procedural differences between the arrangement prior to the stay and the scheme outlined in Judge Richey's opinion are less significant. Accordingly, we see no need to vacate our stay on the ground the Special Prosecutor urges. In any event, we would approve, on an interim basis, an interlocutory modification of Judge Richey's restraining order, which he might desire to make, to permit any necessary access satisfactorily demonstrated to him by the Special Prosecutor—as distinguished from an order implementing Judge Richey's opinion or any further determination on the issues of ownership or privilege. In that event, the Special Prosecutor has our leave to apply to us for a further order excepting such a modifying order from the operation of our stay.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1063

RICHARD NIXON, PETITIONER

v.

HON. CHARLES R. RICHEY,
United States District Court
for the District of Columbia, RESPONDENT

SUPPLEMENTAL MEMORANDUM BY RESPONDENT

Respondent wishes to set the record straight with respect to the circumstances surrounding entry of its opinion in the consolidated cases (C.A. No. 74-1518, C.A. No. 74-1533, C.A. No. 74-1551) which are now the subject of a stay issued by the above court at about 5:00 p.m. on January 31, 1975. The questions asked by the Court of Appeals in this case at the time of oral argument and some of the pleadings herein indicate that some of the facts may have been subject to question by the parties. Respondent emphatically states that it did not act in anticipation of an adverse opinion or directive from the Court of Appeals. Any other conclusion has no basis in fact, and indeed is contradicted by the facts. Respondent herein feels compelled to give the Court of Appeals the benefit of the facts, some of which are solely within this Court's knowledge.

On two occasions prior to January 30, 1975, Respondent stated on the public record that its opinion in the consolidated cases would be completed by January 31, 1975. First, by letter of January 23, the Respondent informed counsel that the opinion would issue during the week of January 27. Second, in Respondent's "Memo-

APPENDIX A—Continued

randum by Respondent" filed in the mandamus suit at about 4:30 p.m. on January 30, this Court stated that the opinion should be released on the following day, January 31, 1975.

Having made these representations to this Court and the parties, Respondent felt that it was *imperative* to meet the deadline of Friday, January 31, 1975. These representations to the Court of Appeals and counsel were the *sole* source of the Respondent's action on Friday morning. In particular, Respondent *did not* act in anticipation of any ruling by the Court of Appeals in the mandamus suit. A Court of Appeals ruling simply did not appear to be imminent on Thursday, January 30, because the responses of parties were not due until 4:30 that afternoon. In fact, Respondent's response was filed on or about that time in the Office of the Clerk of the Court of Appeals.

In view, then, of the Respondent's representation to the Court of Appeals at or about 4:30 p.m. on Thursday, January 30, that Respondent's opinion "should be ready for release on Friday [January 31]," Respondent perceived that the proper course would be to work until any hour on Thursday evening until the job was complete. Not an insubstantial amount of work remained even as Respondent made that statement to the Court of Appeals. As declared in the statement, some 85 pages of the opinion were complete, some citations were still to be checked, and Respondent's secretary was still re-typing the final draft. Completion of a 98-page opinion is not a matter to be taken for granted. Therefore, Respondent's entire staff remained until the job was done: Respondent, its secretary, law clerks, and courtroom clerk.

Shortly after 2:00 a.m. on Friday, January 31, the opinion was completed. Respondent signed the opinion at that early morning hour and the deputy courtroom clerk filed the opinion in the Office of the Clerk of the United States District Court so that copying could be completed. Respondent, however, did not sign and file the judgment at that time.

The deputy courtroom clerk stayed after the rest of the staff had left the Courthouse in order to complete all

copies of the opinion for the attorneys and the public. Approximately 60 copies of the opinion were estimated for these purposes.

The Respondent and its staff returned to the Courthouse shortly before 9:00 a.m. on Friday, January 31. A synopsis of the opinion was prepared and the hour of approximately 11:00 a.m. was established as the time when *public* copies of the synopsis and opinion would be available, since that amount of time would be required to make copies of the synopsis. The deputy courtroom clerk, who had voluntarily stayed even later than the rest of the staff to copy the filed opinion, arrived after 10:00 a.m. Pursuant to earlier instructions of Respondent, she proceeded to call the numerous attorneys involved in the case to inform them that Respondent had ruled and that copies of the opinion would be available at about 11:00. Some time after 10:00 a.m.. Respondent received in chambers an order of the Court of Appeals denying the petition for a writ of mandamus and the accompanying *per curiam* opinion. The Respondent immediately read and discussed that opinion with its law clerks.

Respondent found in the *per curiam* opinion that in denying the petition for writ of mandamus the Court of Appeals suggested how Respondent should proceed. The procedure outlined was that Respondent should decide the three-judge court question *prior* to ruling in the consolidated cases even though the writ of mandamus was denied. Respondent was perplexed, needless to say. The suggested course of action was *impossible* to follow at that time because Respondent had *already acted* in the consolidated cases as promised. In view of the events as they had occurred, Respondent could not retract the opinion. However, the Respondent never filed a judgment in the case.

The inescapable conclusion from the facts as set forth herein is that Respondent effectuated its opinion in the consolidated cases, neither in violation of an order of the Court of Appeals, nor in contravention of an opinion of the Court of Appeals, nor in anticipation of an adverse decision of the Court of Appeals. Further, the Court of

Appeals' *per curiam* opinion attached to its order denying the petition for a writ of mandamus suggesting procedure in the district court was not filed until at least seven hours after Respondent had acted.

Respondent, or any member of the district court, would never act in violation of an order or opinion of this Court of Appeals, or the Supreme Court of the United States.

In addition to the foregoing, it should be noted that within three business days (February 5, 1975) following receipt of the Court of Appeals' *per curiam* opinion, this Respondent requested the convening of a three-judge court and two other judges were designated on that same day.

Respectfully submitted,

/s/ Charles R. Richey
CHARLES R. RICHEY
United States District Judge

APPENDIX B

January 31, 1975

MEMORANDUM

TO JUDGES: Robinson
Wilkey

RE: *Nixon v. Richey*, No. 75-1063
Petition for Mandamus

FROM: Daniel M. Cathey

This memorandum is being submitted at your request.

To the best of my recollection the following events and conversations occurred in connection with the petition for writ of mandamus filed the afternoon of January 28, 1975. The times reflected below are approximate unless marked with an asterisk—these are times when I looked at the clock in my office and made a note of it.

January 28, 1975

4:00 P.M. Petition for Writ of Mandamus referred to Court Law Clerk.

*4:20 P.M. I called counsel for petitioner to inquire if Judge Richey had already ruled and if not when was counsel advised he may rule. Counsel referred to Judge Richey's letter and said he did not know.

4:35 P.M. I tried to contact the Civil Docket Division of the Clerk's Office of the District Court. There was no response.

4:45 P.M. I called Judge Richey's Chambers—from my prior Courtroom Clerk experience I recalled that Courtroom Clerks do on occasion pick up orders from chambers. Judge Richey's law clerk put Judge Richey on the telephone and Judge Richey asked me what we had. I told him a petition for writ of mandamus was filed with this office. Judge Richey advised me that his order had not been filed but he intended to rule before the end of the week.

4:55 P.M. The Court Law Clerk told me she would take the matter up with the Presiding Judge of the division to find out if action should be taken that night since Judge Richey did not tell me exactly when he would rule.

5:10 P.M. The Court Law Clerk returned and said the matter would be taken up at the motions conference.

January 29, 1975

The Petition for Writ of Mandamus was taken up orally by the Court Law Clerk at the motions conference.

• • • •

3:15 P.M. My Secretary called all counsel and read the order directing that responses be filed to the Petition for Writ of Mandamus by 4:30 P.M. Thursday, January 30, 1975, and a copy was delivered to Judge Richey's Chambers.

• • • •

January 30, 1975

3:50 P.M. Judge Richey's Secretary called me and said Judge Richey would respond to the order.

4:00 P.M. A copy of the Government's response was hand delivered by Mr. Kline to Judge Richey's Chambers.

• • • •

*4:20 P.M. Judge Richey came to my office with his response to this Court's order. I told Judge Richey I expected something tonight, I was not sure, but in any event I would call him forthwith at his Chambers or his unlisted home telephone number which he had given me.

5:30 P.M. I called Judge Richey's Chambers and told his Secretary I was going home and gave her my home number.

January 31, 1975

• • • •

9:45 A.M. My Secretary called counsels' offices to advise of entry of the order. Mr. Bonner's Secretary went to deliver a copy of the order to Judge Richey's Chambers.

*9:50 A.M. Judge Richey called me and asked "what did the Court do, Dan?" I read the order on the Petition verbatim and told him a copy was being delivered now to his Chambers. He said, "then the case is closed?" I read the order again and emphasized "for the reasons and on the conditions stated in attached Per Curiam opinion." He said "O.K., I'll read that." He also said he was up until 3:00 A.M. working on his opinion.

*9:55 A.M. Mr. Bonner's Secretary returned to my office and said the order was delivered and

said before she left Judge Richey's Chambers she heard someone in the inner office say "Bring that in!"

11:15 A.M. One of the Court Law Clerk's told me Judge Richey had ruled.

11:20 A.M. I called Judge Richey's Courtroom Clerk and asked what time the order was filed. She said 11:00 A.M.

*1:27 P.M. Judge Richey's Courtroom Clerk called me back and said the opinion was filed at 2:30 A.M. but for mechanical difficulties the order was not *released* until 11:00 A.M.

1:45 P.M. Judge Richey called me and asked if his Courtroom Clerk had called. I said yes and he said he wanted the facts to be straight and the correct information to my Court to be correct.

3:00 P.M. Counsel for Petitioner filed a motion for reconsideration.

* * * *

5:00 P.M. My office called counsel to notify them of the order staying the effectiveness of Judge Richey's opinion and any orders and a copy was delivered to Judge Richey's Chambers.

Supreme Court, U. S.
FILED
JAN 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX
[Volume I – Pages 1-356]

FILED MAY 3, 1976

PROBABLE JURISDICTION NOTED NOVEMBER 29, 1976

Washington, D.C. • TIBEL PRESS • (202) 638-4821

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The Opinion of the lower court is printed at 408 F. Supp. 321, and is found in Appendix A to Appellant's Jurisdictional Statement, pp. 1a-106a.

The Order of the lower court is found in Appendix B to Appellant's Jurisdictional Statement, pp. 107a-108a.

The Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. §2107 note, 3315-24, is found in Appendix D to Appellant's Jurisdictional Statement, pp. 107a-123a.

CIVIL DOCKET
United States District Court for the
District of Columbia

Number 74-1852
Action For
INJUNCTION & DECLARATORY JUDGMENT

RICHARD NIXON, individually and
as former President of the
United States,
Plaintiff,
vs.
ADMINISTRATOR OF GENERAL
SERVICES,
and
THE UNITED STATES OF
AMERICA,
Defendants

PARTIES	ATTORNEYS
RICHARD NIXON, individually and as former President of the United States Plaintiff	Herbert J. Miller, Jr. 2555 M St., N.W. 20036 293-6400
JACK ANDERSON Intervenor-plaintiff	William A. Dobrovir 2005 L St., N.W. 20036 785-8919
vs.	
1. ADMINISTRATOR OF GENERAL SERVICES	Jeffrey Axelrad Dept. of Justice 20530 739-3300
2. THE UNITED STATES OF AMERICA Defendants	- do -

HENRY S. RUTH, JR., SPECIAL PROSECUTOR	Kenneth S. Geller Asst. Spec. Prosecutor 1425 K St., N.W. 20005
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AMERICAN HISTORICAL ASSOCIATION AMERICAN POLITICAL SCIENCE ASSOCIATION JAMES MacGREGOR BURNS NAT HENTOFF DONALD G. HERZBERG WILLIAM LEUCHTENBURG ARTHUR LINK J. ANTHONY LUKAS AUSTIN RANNEY CLEMENT E. VOSE	Mark J. Spooner 1229 - 19th St., N.W. 20036 872-6700
LILLIAN HELLMAN BLAIR CLARK THOMAS BRANDON	Melvin L. Wulf 410 First St., S.E. 20003 544-1681
ADRIAN deWIND NORMAN DORSEN STEPHEN GILLERS JOHN HERSEY ROBERT SILVERS TELFORD TAYLOR HANNAH WEINSTEIN	Melvin L. Wulf 410 First St., S.E. 20003 544-1681

Intervenor-defendants

Dec. 20 Complaint, appearance, filed D.A. & A.G. ser 12-27-74

Dec. 20 Summons, Copies (3) and Copies (3) of Complaint issued #1 ser 1-6-75

Dec. 20 APPLICATION of pltf. for Temporary Restraining Order.

Dec. 20 APPLICATION of pltf. for convening of Three-Judge District Court.

*Dec. 23 SUPPLEMENTAL memorandum by pltf. in support of application for appointment of a three-judge panel; c/s 12/23/74.

*Dec. 20 MOTION of pltf. for TRO, heard in part and to be held in abeyance. (Rep: T. Dourian)

Richey, J.

Dec. 30 MOTION of Jack Anderson to intervene as party pltf.; P & A's; Exhibit; c/s 12/30/74. $5.00 paid & credited to U.S. by Dobrovir. Appearance of William A. Dobrovir, 2005 L St., N.W., 20036)

1975

Jan. 3 REQUEST by pltf. for immediate appointment of Three-Judge District Court; Memorandum; c/s 1/3/75.

Jan. 3 MOTION of pltf. for preliminary injunction; Memorandum; Appendix; c/s 1/3/75.

Jan. 9 MOTION of Henry S. Ruth, Jr., Special Prosecutor to intervene as party deft.; copy of affidavit of Leon Jaworski; Exhibit (Memorandum of Leon Jaworski; Exhibit; c/m 1/9/74. Appearance of Kenneth S. Geller, 1425 K St., N.W., 20005) No. fee- U.S. Govt.

Jan. 9 OPPOSITION by defts. to motion of Jack Anderson to intervene; c/m 1/9/75.

Jan. 9 ANSWER of defts. to complaint; c/m 1/9/75. Appearance of Jeffrey Axelrad, Dept. of Justice.

Jan. 9 CALENDARED CD/N

Jan. 9 MEMORANDUM of pltf. Nixon in opposition to motion by Jack Anderson to intervene; c/m 1/8/75.

Jan. 10 REQUEST by pltf for scheduling of evidentiary hearing on Preliminary Injunction motion; memorandum; c/m 1-10-75.

Jan. 10 MOTION of The Reporters Committee for Freedom of the Press, et al to intervene as defts; P&A; exhibits (2); c/m 1-10-75. (app. of Mark J. Spooner, 1229–19th St., N.W.) $5.00 paid by Spooner and credited to United States.

Jan. 14 OPPOSITION by pltf. to motion of intervenor-defts. for extension of time to respond to pltf's motion for preliminary injunction; c/m 1-14-75.

Jan. 16 REPLY by applicant-intervenor to oppositions to motion to intervene by Jack Anderson; c/m 1/14/75.

Jan. 17 JOINT motion for enlargement of time; P&A.

Jan. 17 RESPONSE of defts. to application for convening a three-judge court; c/m 1-17-75.

Jan. 17 OPPOSITION of defts. to motion to intervene filed by the Reporters Committee for Freedom of the Press, et.al.; c/m 1-17-75.

Jan. 17 OPPOSITION of pltf. to motion of the Reporters Committee for Freedom of the Press, et.al. to intervene; c/m 1-17-75.

Jan. 24 RESPONSE by applicant-intervenors, The Reporters Committee for Freedom of the Press, et al to oppositions filed by plaintiff Nixon and defts. to motion to intervene; c/m 1/23/75.

Jan. 31 HEARING on Motion for Three-Judge Court set 2-6-75 at 2 P.M.
(Rep: T. Dourian) Richey, J.

Feb. 5 APPLICATION from Judge Richey to Judge Bazelon requesting a Three-Judge Court; memorandum in re application. (N) Richey, J.

Feb. 6 DESIGNATION of the Honorable Carl McGowan, United States Circuit Judge, and the Honorable Edward Tamm, United States Circuit Judge, to serve with the Honorable Charles R. Richey, United States District Judge, as members of the Court to hear and determine this action.
(N) Bazelon, Chief Judge, U.S.C.A.

Feb. 12 MEMORANDUM by applicant-intervenors, The Reporters Committee for Freedom of the Press, etal in opposition to application of pltf. for convening a Three-Judge Court; attachment (1); c/s 2-12-75.

Feb. 13 MOTION of Lillian Hellman, et al to intervene as defts.; P & A's; Exhibit; c/m 2/7/75. $5.00 paid & credited to U.S. by Wulf. Appearance of Melvin L. Wulf, 410 First St., S.E., 20003)

Feb. 13 SUPPLEMENTAL memorandum by Jack Anderson, applicant-intervenor, in support of motion to intervenor; c/m 2/13/75.

Feb. 14 COPY of order U.S.C.A. staying effectiveness of opinion issued 1/31/75, and no further orders to be issued in this case until further order of U.S.C.A.; copy attached w/appendices A & B.

Feb. 19 MOTION of pltf. suggestion recusal of the Hon. Judge Charles R. Richey; P & A's; c/m 2/19/75.

Feb. 19 Opposition of Pltf. to motion to intervene by Hellman, et al.; P&A's; c/m 2/19/75

Feb. 20 ORDER setting hearing 3/17/75 at 9:30 A.M.; allowing movants for intervention to participate in hearing as amici curiae; directing and amici to submit briefs by 3/7/75 and supplementary replies by 3/13/75.

(N) McGowan, J., Tamm, J., Richey, J.

Feb. 20 ORDER denying motion of pltf. suggesting recusal.

(N) Richey, J.

Mar. 7 MEMORANDUM of Lillian Hellman, et al, amici curiae, re: jurisdiction of Three Judge Court and priority of consolidated cases and statutory case; c/m 3/5/75.

Mar. 7 RESPONSE by Government to issues posed by the Court; c/m 3/6/75.

Mar. 7 MEMORANDUM of the Reporters Committee for Freedom of the Press, et al with respect to the question of "priority"; c/s 3/7/75.

Mar. 7 MEMORANDUM of Jack Anderson as amicus curiae in response to the Court order of Feb. 20, 1975; c/m 3/7/75.

Mar. 7 MEMORANDUM of the Special Prosecutor, amicus curiae, re jurisdiction and priority; c/s 3/7/75.

Mar. 7 MEMORANDUM of pltf. Nixon re jurisdiction of the Three-Judge Court and the issue of priority; c/s 3/7/75.

Mar. 13 REPLY memorandum of Jack Anderson, amicus curiae; c/m 3/12/75.

Mar. 13 REPLY memorandum of The Reporters Committee for Freedom Of The Press, et al, amici curiae, concerning the convening of a Three-Judge Court and the issue of priority; c/s & c/m 3/13/75.

Mar. 13 REPLY memorandum by pltf. Nixon on the issues of jurisdiction and priority; c/s & c/m 3/13/75.

Mar. 17 HEARING begun to determine whether a Three-Judge Court has been properly convened,; concluded and taken under advisement.

(Rep: T. Dourian)

McGowan, J., Tamm, J., Richey, J.

Mar. 20 REPORT by defts. to the Court; attachment (report); c/m 3/20/75.

Mar. 21 MEMORANDUM by pltf. Nixon re two developments which affect issues pending before the Court; c/m 3/21/75.

Mar. 27 REPLY of The Reporters Committee For Freedom of the Press, et al to memorandum of pltf. re two developments which affect issues pending before the Court; c/s 3/27/75.

Mar. 28 NOTICE to C.J. Bazelon & C.J. Hart requesting the appointment of another Judge. (N)

Apr. 1 MEMORANDUM of Jack Anderson, amicus curiae, on two recent Supreme Court decisions; c/m 3/31/75.

Apr. 3 DESIGNATION of The Honorable Gerhard A. Gesell, United States District Judge to serve in place and stead of The Honorable Charles R. Richey as member of the Three-Judge Court. (signed April 1, 1975)

(N) Bazelon, C.J., U.S.C.A.

Apr. 8 REPLY by pltf. to memorandum of amicus curiae Anderson on two recent Supreme Court decisions; c/m 4/8/75.

Apr. 8 REASSIGNMENT of case from Judge Richey to Judge Gesell.
Pratt, J.

Apr. 10 SUGGESTION by pltf. re: reappointment of Judge Gesell as a member of panel; P & A's; c/m 4/10/75.

Apr. 11 ORDER from U.S. Court of Appeals vacating designation of the Honorable Gerhard A. Gesell, U.S. District Judge to serve inplace and stead of the Hon. Charles R. Richey; referring to Chief Judge George L. Hart, Jr. of the District Court for proper designation of a judge to replace Judge Richey.
Bazelon, Chief Judge, U.S.C.A.

Apr. 11 ORDER assigning case to Judge Aubrey E. Robinson for all purposes.
(N) Hart, C.J.

Apr. 14 CAPTION amended sua sponte by striking "to three-judge panel"
(fiat) (N) Hart, C.J.

Apr. 14 DESIGNATION of the Hon. Aubrey E. Robinson to serve in place of the Hon. Gerhard A. Gesell as a member of the three-judge Court.
Wright, J., Acting C.J., U.S.C.A.

May 1 ORDER granting motions for intervention of Special Prosecutor; Reporters Committee, et al, Lillian Hellman, et al and Jack Anderson; said intervention shall be limited; scheduling pre-hearing conference for 5/29/75 at 2:00 P.M.; parties, including intervenors shall submit certain memoranda within 15 days. (N)
McGowan, J., Tamm, J., Robinson, J.

May 1 COMPLAINT by intervenor, Jack Anderson.

May 1 ANSWER by intervenor-deft. Henry S. Ruth, Jr., Special Prosecutor to the complaint; counterclaim; Exhibit A attached.

May 1 ANSWER of intervenor-defts. The Reporters Committee For Freedom Of The Press, et al to the complaint.

May 1 MOTION of intervenor-defts., The Reporters Committee For Freedom Of The Press, et al for extension of time to respond to motion of plf. for preliminary injunction.

May 1 ANSWER OF INTERVENOR-defts., Lillian Hellman, et al to complaint.

May 6 TRANSCRIPT OF PROCEEDINGS, March 17, 1975, pages 1-90. Court's copy
Reporter: Tom Dourian

May 6 CHANGE of address for pltf. (unsigned) CD/N

May 16 PRE-HEARING Conference Memorandum by pltf.; c/m 5-16-75.

May 16 PREHEARING Memorandum by Federal defts.; c/m 5-16-75.

May 16 MEMORANDUM of intervenors, The Reporters Committee for Freedom of the Press, etal, Lillian Hellman, etal and Jack Anderson on pre-hearing matters pursuant to Order of May 1, 1975; c/m 5-16-75.

May 16 MEMORANDUM of the Special Prosecutor in response to the Court's Order; c/m 5-16-75.

May 19 REQUEST by intervenors re: substitution of attached page 5 for page 5 of Memorandum filed May 16, 1975.

May 29 PRE-HEARING Conference. (REP: G. Federation) ROBINSON, J.

Jun 13 ORDER granting Pltff. until 6-30-75 to submit certain documents; parties briefs to be filed by certain dates; setting matter for oral argument on 9-22-75. (N) Robinson, J.

June 30 EVIDENTIARY submission by pltf. Nixon: Request for admissions; Exhibits A, B w/Exhibits A & B; C w/Exhibit A; D; E; F; G; H; I; J; c/s 6/30/75.

July 2 NOTICE by intervenor-pltf., Jack Anderson, to take deposition of pltf. Richard Nixon; c/m 7/1/75.

July 9 MOTION of pltf., Nixon for a protective order; c/s 7-9-75.

July 14 OPPOSITION by intervenor-pltf., Jack Anderson to motion for a protective order; attachments A, B, & C; c/m 7-14-75.

July 15 POINTS and authorities by defts. in response to motion of pltf., Nixon for a protective order; c/s & c/m 7-15-75.

July 16 ORDER denying Pltfs motion for protective order provided deposition of Mr. Nixon be taken within 10 days at or near his home. (N) (McGowan J., Robinson J.)

Jul. 29 REQUEST by Jack Anderson, intervenor-pltff. for admissions; schedule; c/m 7-29-75.

July 31 STIPULATION by all counsel re: submission of affidavits.

July 31 EVIDENTIARY submission by defts., U.S. and Administrator of General Services: Affidavit of Harry J. Middleton w/Exhibits A thru E;

Affidavit of William R. Emerson w/Exhibits A thru U; Affidavit of William R. Emerson, Director of the Franklin D. Roosevelt Library; Affidavit of Jeanne W. Davis; Affidavit of John Stewart; Affidavit of Daniel J. Reed w/Exhibits A thru D; c/m 7-31-75.

July 31 STIPULATION by all counsel re: testimony given by John Nesbitt on Nov. 15, 1974, in C.A. 74-1813 shall be considered as testimony given in C.A. 74-1852.

July 31 STIPULATION by all counsel re: testimony given in re subpoenas duces tecum, Misc. No. 47-73 with regard to installation, maintenance and use of White House taping system will be considered testimony in C.A. 74-1852. (See stipulation for details)

July 31 STIPULATION by all counsel re: attachments designated Exhibits A thru EE are true copies of articles relating to the accession of papers of prior Presidents by the Library of Congress; Exhibits A thru Z; AA thru EE; c/m 7-31-75.

July 31 EVIDENTIARY submission by intervenor-defts.: Affidavits by Paul Henry Nitze; Morton H. Halperin w/exhibits; George F. Reedy; John P. Roche; James MacGregor Burns; Peter Lisagor; James M. Naughton; Robert Novak; Julian P. Boyd; Letter of Elbert B. Smith, dated 11/7/74; Copies, provided by counsel for pltf. Nixon on July 29, 1975; Selected portions of the record of "consolidated cases", C.A. 74-1518, 74-1533, 74-1551 and response to request for admissions; c/s 7-31-75. (See submission for details)

July 31 STIPULATION by all counsel that testimony of Phillip W. Buchen, Counsel to President Ford, given in deposition C.A. 74-1518 on Nov. 11 and 12, 1974, may be relied upon by the parties in C.A. 74-1852 as evidence; c/s 7-31-75.

July 31 SUPPLEMENTAL Evidentiary presentation by pltf. Nixon: Affidavits of Richard A. Jacobs w/exhibits A thru K; Thomas P. Wolf; William F. Matthews w/exhibits A thru D; Gertrude Fry; John C. Broderick w/exhibits A thru H; Jack Alvin Albright (copy); Mildred Stegall (copy); John R. Hubbard (copy); c/s 7-31-75.

Aug. 4 NOTICE of pltffs. to take deposition of Jeanne W. Davis; c/m 7-29.

Aug. 14 TRANSCRIPT OF PROCEEDINGS of 5-29-75, pages 1-58; courts copy Rep: E. Fedoration

Aug. 14 REQUEST by intervenor-defts' the Reporters Committee to pltf.; et al; c/s 8-14-75.

Aug. 18 DEPOSITION of Jeanne Davis for pltff; exhibits (5); published and filed.

Aug. 19 STIPULATION by all counsel in re: testimony by Directors Presidential Libraries; exhibits A thru G; c/s 8-19-75.

Aug. 19 BRIEF of pltff in support of claim for permanent injunctive and declaratory relief; table of contents; table of authorities; statement; c/s 8-19-75.

Aug. 20 DEPOSITION of Richard M. Nixon by defts and intervenor; Vol. I; Exhibits (2)

DEPOSITION of Richard M. Nixon by defts and intervenor; Vol. II; Exhibit (1)

DEPOSITION of Richard M. Nixon (consisting of exhibits) by defts and intervenor

MEMORANDUM of defts and intervenor deft Jack Anderson in re: Amendments to pltffs deposition; C/S 8-20-75.

Aug. 21 RESPONSE of pltff. to intervenor-defts request for admission; c/s 8-21-75.

Aug. 22 AFFIDAVIT of Richard N. Goodwin; c/m 8-22-75.

Aug. 26 SUBMISSION by defts' and intervenor deft Jack Anderson of affidavits (2) of Joseph F. Weitzen, the Court reporter who transcribed the deposition of Richard Nixon on July 25, 1975; c/m 8-25-75.

Aug. 29 RESPONSE by pltffs' to intervenor-defts' request for admissions; c/m/29-75

Sept. 8 MOTION by Special Prosecutor for leave to withdraw as counsel; c/m 9-8-75.

Sept. 8 BRIEF of defts. United States and Administrator of General Services; table of contents; table of authorities; statement; c/s 9-8-75.

Sept. 8 JOINT memorandum of intervenor-defts in opposition to pltffs request for injunctive and declaratory relief; table of contents; statement; appendix (1); c/s 9-8-75.

Sept. 11 REQUEST by Counsel for intervenor-defts re: filing table of authorities to joint memrandum filed 9-8-75; table of authorities

Sept. 15 REPLY brief of pltff; table of contents; appendix A; c/m 9-15-75.

*Sept. 18 ERRATA sheet by pltff for reply brief; c/m 9-18-75.

Sept. 19 DEPOSITION of Jeanne Davis for pltff.

**Sept. 17 ORDER granting motion of Special Prosecutor for leave to withdraw. (N). Robinson, J.
McGowan, J. USCA
Tamm, J. USCA

Sept. 19 STIPULATION that attached letter from Watergate Special Prosecutor may be consider as evidence in connection with issues before the Court, subject to any objection the parties would have if a representative of Watergate Special Prosecutor Force were testifying; attachment.

Sept. 22 CASE argued and taken under advisement.
Robinson, J.
McGowan, J.
Tamm, J.

Sept. 30 TRANSCRIPT OF PROCEDINGS, September 22, 1975; courts copy; Rep: E. Fedoration

Nov. 11 MOTION of pltff to supplement record; Exhibit A, B; c/m 11-11-75.

Nov. 13 PAGE 11 of Exhibit B to pltffs motion to supplement record filed 11-11-75.

Nov. 24 RESPONSE of intervenor-defts to pltff Nixon's motion to supplement record; c/s 11-24-75; P&A.

Nov. 26 REPLY of intervenor Jack Anderson to pltff Nixon's motion to supplement record; c/m 11-24-75.

Dec. 16 TRANSCRIPT OF PROCEEDINGS, 9-22-75; pages 1-106; courts copy; Rep: E. Fedoration

Dec. 17 ORDER granting pltffs motion of 11-11-75 to supplement record. (N). Robinson, J.

1976

Jan. 7 SUMMARY; Opinion and Order denying preliminary and permanent injunctive relief; dismissing complaint. (N). McGowan, J.
Tamm, J.
Robinson, J.

Mar. 5 NOTICE of appeal by pltff to the Supreme Court of the United States from Order of 1-7-76. ($5.00 paid and credited U.S.) Copies of notice of appeal to Irwin Goldbloom, William A. Dobrovir, Robert E. Herzstein and Leon Friedman.; c/m 3-4-76.

Mar. 12 MOTION of pltff to protect the status quo pending appeal; P&A's; c/s 12-76

Mar. 22 RESPONSE by Intervenor-defts. to motion of pltf. to protect the status quo pending appeal; c/m 3/22/76.

Mar. 22 POINTS and authorities by the defts. in opposition to pltfs. motion to protect the status quo pending appeal; c/m 3/22/76.

Mar. 23 MOTION of defts to amend this court's order of 1-7-76; affidavit of James B. Rhoads; Appendix A; P&A's; c/m 3-23-76.

Mar. 24 REPLY by pltfs. to the government and intervenor-defts. opposition to pltfs. motion to protect the status quo pending appeal; Exhibit A; c/m 3/24/76.

Mar. 25 ORDER denying pltffs motion to protect the status quo pending appeal. (N). McGowan J.
Tamm, J
Robinson, J.

Apr. 1 RESPONSE of pltff Nixon to the motion of Government to amend this courts order of 1-7-76; c/m 4-1-76.

Apr. 1 ORDER amending Opinion and Order of 1-7-76 by substituting certain portions. (N).
McGowan, J.
Tamm, J.
Robinson, J.

Apr. 15 ORDER permitting Administrator to move certain materials to Washington National Records Center, Suitland, Maryland. (N).
McGowan, J.
Tamm, J.
Robinson, J.

June 16 ORDER filed June 15, 1976 for release of hand-made American flag and return of same. (N)
Gasch, J.

June 15 MOTION by pltf. for leave to release an item in the presidential materials; memorandum: c/m 6/15/76.

Oct. 05 RECORD on appeal delivered to Supreme Court; Receipt acknowledged.

[Caption Omitted in Printing]

COMPLAINT
(INJUNCTION; DECLARATORY JUDGMENT)

Plaintiff, complaining of Defendants, alleges as follows:

I. Introductory Statement

1. This is a suit by Richard Nixon, former President of the United States, challenging the validity of an Act of Congress purporting to authorize the seizure, confiscation and disclosure of Mr. Nixon's Presidential materials in violation of his rights and privileges both as a citizen and former President. By this action, Plaintiff seeks a temporary restraining order and preliminary and permanent injunctions against enforcement, operation and execution of the Act, as well as a declaration of its invalidity. Plaintiff, by this action, also seeks implementation of a depository agreement or, alternatively, return of his Presidential materials.

II. Jurisdiction and Venue

2. This Court has jurisdiction to hear this action under Title 28 U.S.C. Sections 1331, 1332, 1346, 1356, 1361, and 2282. The amount of controversy, exclusive of interest and costs, exceeds the sum or value of $10,000. The Defendant Administrator is found in the District of Columbia and many of the acts hereinafter alleged to have been committed were committed in the District of Columbia.

III. Parties

3. Plaintiff, Richard Nixon, is a citizen of the United States and a resident of the State of California. He has

served as a member of the House of Representatives and the Senate of the United States, as Vice President, and as President of the United States from January 20, 1969, until his resignation on August 9, 1974.

4. The Administrator of General Services is named a Defendant herein.

5. The United States is named a Defendant herein.

IV. Nature of the Claim

The Presidential Materials In Question

6. During his term as President, Richard Nixon maintained at the White House, and other Presidential offices, many of his purely personal materials, including family and law practice records, memorabilia, correspondence and other items which cover periods of time both prior to and during his Presidency. Some of these personal materials are still located within the White House complex and, despite requests, have not at this time been sent to the former President.

7. During his term as President, Richard Nixon maintained within the White House and other Presidential offices materials related to his political activities both before and during his Presidency. Many of these political materials are still located within the White House complex and, despite requests, have not at this time been sent to the former President.

8. In addition to the personal and political materials referred to above, Richard Nixon and members of his staff, during the period Mr. Nixon served as President, generated and retained within the White House, the Old Executive Office Building ("OEOB"), parts of the New Executive Office Building ("NEOB") and other Presidential offices a substantial amount of materials which include, among other things, documents, papers, tapes, photographs, notes and other items, relating to Mr. Nixon's activities as President of the United States and to the conduct of government affairs.

9. All of the materials referred to in paragraphs 6, 7 and 8 herein, which were produced between January 20, 1969, and August 9, 1974, constitute the Presidential materials of Richard Nixon. As has been the case with every President of the United States, the Presidential materials generated and retained during the term of a President are the property of that President. Mr. Nixon is the owner of his Presidential materials.

10. During Plaintiff's term as President of the United States, he was aware of the fact that those who had previously held the Office of President treated their Presidential materials as their own. Plaintiff was also aware that Congress to that time had never opposed the actions of previous Presidents who had asserted total dominion over their Presidential materials but, to the contrary, had specifically provided a statutory procedure in Title 44 U.S.C. §2107 whereby a President—if he so desired—could deposit his Presidential materials with the General Services Administration under restrictions as to their use and access acceptable to the Administrator of GSA. With this knowledge and in reliance thereon, Plaintiff caused to be created and retained a substantial amount of materials which he would not have created or retained if he had concluded that such materials were not his personal property to be used as he deemed appropriate.

11. Many of Mr. Nixon's Presidential materials embody, constitute or reflect communications between himself and his aides relating to the conduct of the Office

of the President. The Constitution of the United States affords a privilege of confidentiality as to such materials both during and after the President's term in office subject to exception only upon demonstration of a specific need for relevant evidence in a criminal prosecution. The Supreme Court of the United States has held that the basis of this privilege is "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in presidential decision-making," as well as "the values to which we accord deference for the privacy of all citizens." Plaintiff claims the Presidential privilege as to such materials.

12. Many of Mr. Nixon's Presidential materials constitute, embody or reflect communications between Plaintiff and his wife, family, attorney, physician and others with whom he enjoys a legally or constitutionally protected privilege of confidentiality. Plaintiff claims the privilege as to such materials.

13. Because of the national interest in a swift but orderly transition from the Presidency of Richard Nixon to the Presidency of Gerald Ford, there was not adequate time when President Nixon resigned on August 9, 1974, to arrange for transfer of all the former President's Presidential materials and his personal records to his California residence or storage facility in the vicinity. Plaintiff directed and therefore acted on the assumption that his Presidential materials would be transferred forthwith to California so that he could personally review the materials or cause them to be reviewed under his direction, and thereafter processed, categorized and ultimately placed in a Presidential Library.

14. Because of demands made by the Special Prosecutor to staff members of the White House, directions were given that Plaintiff's Presidential materials

not be sent to his custody in California. To the date of the filing of this complaint, Mr. Nixon's Presidential materials remain in the custody of officials of the White House, the General Services Administration, and the Secret Service, and have not been shipped to him in California.

Executive Action

15. On or about September 3, 1974, Philip W. Buchen, Counsel to President Gerald Ford, and other representatives of President Ford entered into discussions with a representative of Plaintiff concerning his Presidential materials and the possible deposit of all or part thereof with the United States under conditions whereby the safety of the materials would be assured and whereby access could be gained upon lawful judicial order or other legal processes directed to Plaintiff.

16. On or about September 3, 1974, representatives of Plaintiff learned from Philip Buchen or his agents that William Saxbe, the Attorney General of the United States, had been requested to give an opinion concerning the legal ownership of Plaintiff's Presidential materials and that the Attorney General had concluded that title to the Presidential materials referred to herein vested in former President Nixon, as has been the case with the papers, documents and effects of every President of the United States.

Agreement to Deposit the Presidential Materials.

17. Because Plaintiff has been unable to obtain custody and control of his Presidential materials after his resignation, he was induced to enter an agreement dated September 6, 1974 (the "depository agreement") with the Defendant Administrator of General Services.

18. The depository agreement between Plaintiff and Defendant Administrator was executed pursuant to the authority of Title 44 U.S.C. § 2107. By that agreement, former President Nixon agreed to place on deposit with the General Services Administration all of his Presidential materials located within the metropolitan area of the District of Columbia, such deposit to be subject to the terms and conditions contained in the agreement.

Some of the Terms and Conditions of the Depository Agreement

19. The depository agreement, *inter alia*, provides that Defendant Administrator will transfer the Presidential materials to California and deposit them temporarily in an existing facility belonging to the United States located near Plaintiff's residence, where they will remain on deposit, under stated terms and conditions, until a permanent Presidential archival depository is established.

20. The depository agreement provides that access to Plaintiff's Presidential materials within both the temporary and permanent Presidential archival depository will require use of two keys, one to be given to Plaintiff, as custodian of the materials, and the other to be given to the Archivist of the United States or to members of his staff.

21. The depository agreement further provides that all of the Presidential materials (except tape recordings of conversations in the White House and Executive Office Buildings) will remain on deposit for a period of three years under terms and conditions specified in the depository agreement. Upon agreement of the parties, the personal materials may be removed without limitation as to time.

22. With respect to the tape recordings of conversations, the depository agreement provides that such recordings will remain on deposit until September 1, 1979. In no event will the tape recordings be destroyed prior to that date. Thereafter, the agreement provides that Plaintiff will and by the agreement did donate to the United States (such gift to be effective September 1, 1979) all of the tape recorded conversations. This gift was conditioned upon Plaintiff's right to order destruction of such of the tapes as he then might direct and upon the further condition that the tapes will be destroyed at the time of the former President's death subsequent to September 1, 1979 or on September 1, 1984, whichever should first occur.

23. In specific recognition of the fact that the Presidential materials should remain available for some period for production in connection with lawful judicial orders or other legal processes, the depository agreement provides that in the event production of the materials is demanded by subpoena or other order directed to an official or employee of the United States, the recipient thereof shall notify Plaintiff so that he, as owner and custodian of the materials, with sole right of access thereto, can respond to the demand and, if appropriate, assert any privilege or defense available. The parties recognized that the former President, as owner and physical custodian of the Presidential materials, will be subject to service of process demanding production of the materials and therefore any legally recognized need for the materials or part thereof can be accommodated.

Interference With the Depository Agreement.

24. On or about September 9, 1974, members of the Watergate Special Prosecution Force met with Philip

Buchen, and members of his staff, and agreed with them not to permit any of Plaintiff's Presidential materials to be transferred to California without the prior approval of the Special Prosecutor. Among other things, the effect of this decision was to interfere with the contractual and ownership rights of Plaintiff and to inhibit Plaintiff's ability to protect the constitutionally based privilege of confidentiality in his Presidential materials and to raise other defenses or privileges available under the Constitution or laws of the United States.

25. In an effort to bring about implementation of the depository agreement, for several weeks prior to October 17, 1974, representatives of Plaintiff participated in negotiations with members of the Watergate Special Prosecution Force concerning implementation of the depository agreement in whole or in part. These negotiations did not result in implementation of the depository agreement and members of the Watergate Special Prosecution Force stated at or about that time that they intended to serve a subpoena *duces tecum* on defendant Buchen demanding production of Mr. Nixon's Presidential materials.

The Demand for Compliance With
The Depository Agreement.

26. On September 13, 1974, the former President requested that steps be taken immediately to implement the depository agreement as to all of the Presidential materials not then subject to subpoena or other court order. As to those materials subject to outstanding subpoenas or court orders, he requested that arrangements be made for storage of such materials in the District of Columbia under conditions whereby access could be gained only by means of the two-key arrangement described in the depository agreement.

27. Subsequent demands for implementation of the depository agreement were made orally to Philip Buchen, to members of his staff, and to the Defendant Administrator, but the depository agreement was not implemented.

Judicial Action.

28. On October 17, 1974, Plaintiff filed a civil action against the Defendant Administrator, Philip W. Buchen, and H. Stuart Knight seeking to compel implementation of the depository agreement. *Nixon v. Sampson, et al.*, C.A. No. 74-1518 (D.D.C.). Within several days thereafter, twenty-one individuals and organizations in two separate actions filed suit against Plaintiff and others demanding access to Plaintiff's Presidential materials and seeking an injunction against implementation of the depository agreement and a declaration that Mr. Nixon did not own his Presidential materials. *The Reporters Committee for Freedom of the Press, et al. v. Sampson, et al.*, C.A. No. 74-1533, (D.D.C.); *Hellman, et al. v. Sampson, et al.*, C.A. No. 74-1551, (D.D.C.). Jack Anderson, a syndicated columnist, seeking similar relief, intervened in *Nixon v. Sampson, et al.*

29. At the present time, in addition to the actions referred to in paragraph 28 herein, there are pending approximately twenty-nine civil actions in which former President Nixon has been named as a defendant or in which demands have been made for production of his Presidential materials.

30. On at least one occasion during the pendency of C.A. No. 74-1518, Philip Buchen or his agents, pursuant to a civil subpoena demand in *Dellums, et al. v. Powell, et al.*, C.A. No. 71-2271 (D.D.C.), conducted a search of certain tape recordings of Plaintiff's conversations there-

by breaching the confidentiality of those communications. At the present time, Philip Buchen is in receipt of a civil subpoena in *Halperin, et al. v. Kissinger, et al.*, C.A. No. 73-1187 (D.D.C.), demanding production of Presidential materials including those subject to a Presidential privilege. Compliance with this subpoena demand will require a search by Philip Buchen's staff of Plaintiff's Presidential materials and will necessarily entail a breach of the confidentiality of those materials and a violation of Plaintiff's legally and constitutionally protected privileges and rights.

31. Subsequent to the filing of *Nixon v. Sampson, et al.*, the Special Prosecutor served a series of eight subpoenas *duces tecum* on Philip Buchen requiring a massive search of Plaintiff's Presidential materials to locate items possibly relevant to the subpoena demands. On November 9, 1974, the Defendant Administrator, Philip Buchen, and H. Stuart Knight entered into an agreement with the Watergate Special Prosecutor whereby the Special Prosecutor and his staff are permitted to conduct a general, warrantless search and seizure of any and all of Plaintiff's Presidential materials, regardless of their character, without any right by Plaintiff to object thereto or to raise any defenses against the production and use of the Presidential materials by the Special Prosecutor in any manner he may desire, even though at the time the parties executed the November 9 search and seizure agreement they were aware of and at least two of them had agreed to the depository agreement which precluded such warrantless searches but permitted production pursuant to lawful subpoenas according to procedures set forth in the depository agreement. Following execution of the search and seizure agreement, the Special Prosecutor withdrew the eight subpoenas previously served on Philip Buchen.

32. On November 11, 1974, Plaintiff requested the Court in *Nixon v. Sampson, et al.*, to enter a restraining order against implementation of the search and seizure agreement. Concurrently, the Special Prosecutor requested an order permitting implementation. To date no order permitting implementation of the search and seizure agreement has been entered.

Congressional Action

33. On September 18, 1974, ten days after the public announcement of the depository agreement, Senators Nelson, Ervin, Javits, Ribicoff, Metcalf, Huddleston, Chiles, Percy, Muskie, Hatfield, Dole, Montoya and Stevenson introduced a bill (S. 4016) in the United States Senate which was designed to abrogate the statutory-based depository agreement between the General Services Administration and Richard Nixon and to confiscate materials, documents, tapes, and other items generated during Mr. Nixon's term as President of the United States.

34. Among the sponsors of the bill, Senators Ervin and Montoya had served as Chairman and member, respectively, of the Senate Select Committee on Presidential Campaign Activities (the "Ervin Committee"). The Ervin Committee had earlier subpoenaed certain tape recordings of conversations between Plaintiff and others made while Mr. Nixon was President, but the United States Court of Appeals for the District of Columbia Circuit ruled that the Committee was not entitled to the recordings because they were presumptively privileged. *(Senate Select Committee on Presidential Campaign Activities v. Nixon,* ___U.S. App. D.C.___, 498 F.2d 725 (1974)).

35. S. 4016 was referred to the Senate Committee on Government Operations which, seven days later, reported it to the full Senate. The Government Operations Committee held no hearings on this controversial and historic measure. S. 4016 passed the Senate on October 4, 1974.

36. Upon referral to the House of Representatives, S. 4016 was sent to the Committee on House Administration on October 7, 1974. That Committee held no hearings on S. 4016, although the Subcommittee had conducted on September 30 and October 4 two hearing sessions on legislation establishing a commission to study the issue of private ownership of materials generated or retained by all constitutional officeholders other than Mr. Nixon, a provision which became Title II of S. 4016. The Committee reported S. 4016 to the full House on November 27, 1974, where it passed on December 3, 1974.

37. Various members of the House of Representatives, sitting as members of the House Judiciary Committee, had earlier attempted to gain access to portions of Plaintiff's Presidential materials by subpoenaing certain materials in connection with impeachment proceedings against then President Nixon.

38. Various members of the House of Representatives, at the time S. 4016 passed the House, were parties to civil litigation in which they seek access to or production of Plaintiff's Presidential materials.

39. Following conference committee action, S. 4016 passed both Houses of Congress on December 9, 1974 and was sent to President Ford for signature. President Ford signed the legislation into law on December 19, 1974.

Various Provisions of the Statute.

40. Title I of the Act is specifically directed at one individual, Richard Nixon. It requires the Defendant Administrator to take control of

> (1) all recordings made in the White House or Presidential offices in the Executive Office Buildings, Camp David, Key Biscayne and San Clemente, during the period Mr. Nixon was President and which involve Richard Nixon *or* other individuals who at the time of the conversation were federal employees; and
>
> (2) all historical materials of Richard Nixon, relating to the period of his Presidency, including "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemorative value." 44 U.S.C. §2101.

41. The Act precludes Plaintiff from access to his Presidential materials until such time as the Defendant Administrator promulgates regulations concerning the security of the materials.

42. The Act purports to permit any agency or department of the executive branch to have access immediately and at all times to the tape recordings and other Presidential materials with priority to be given to requests for access by the Special Prosecutor.

43. The Act purports to make the Presidential materials immediately available for use in any judicial proceeding, subject to rights, defenses or privileges which the Federal Government or any person may invoke.

44. The Act requires Defendant Administrator to submit regulations to each House of Congress for approval within 90 days after enactment of the legislation. Such

regulations are to provide for "public access" to Plaintiff's Presidential materials and are to "take into account":

> "(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
>
> (4) the need to protect every individual's right to a fair and impartial trial;
>
> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
>
> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
>
> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance."

45. The Act does not purport to distinguish between personal, political and official items, but directs seizure of all such materials generated during Mr. Nixon's Presidency.

46. The Act directs seizure of Presidential materials clearly subject to claims of Presidential privilege, as well as to other claims by Plaintiff or privileges or rights protected by law or the Constitution.

47. The Act purports to limit Plaintiff's ultimate access to the Presidential materials to purposes consistent with the provisions of the Act and the regulations promulgated thereunder.

48. The Act purports to prohibit transfer of the Presidential materials to California and requires they be maintained in the Washington, D.C. metropolitan area.

49. The Act, together with its legislative history, purports to direct any judicial challenges to the validity of the Act or any issues related thereto to a specific judge of the United States District Court for the District of Columbia.

50. The Act purports to authorize compensation to Plaintiff to the extent the Act deprives him of his property.

Reasons For Invalidity
Of the Act

51. The Act is unconstitutional, unlawful and void in that it violates Plaintiff's right of privacy under the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States by directing government seizure, inspection and disclosure of private materials and items containing, reflecting or recording the private thoughts, actions and conversations of Plaintiff for review, use, comment and other purposes by government officials, agencies, private litigants and the general public.

52. The Act is unconstitutional, unlawful and void in that it violates the Fourth Amendment to the Constitution of the United States by directing the wholesale seizure, impoundment and use of private materials in the nature of a writ of assistance or general warrant thereby constituting an unreasonable search and seizure.

53. The Act is unconstitutional, unlawful and void in that it deprives Plaintiff of rights and privileges otherwise available to him under the Fourth and Fifth Amendments to the Constitution of the United States.

54. The Act is unconstitutional, unlawful and void in that it violates the Presidential privilege of confidentiality recognized by the Supreme Court in *United States v. Nixon*, ___ U.S. ___, 94 S.Ct. 3090 (1974), by permitting access by government officials and innumerable other persons to materials subject to the Presidential privilege of confidentiality.

55. The Act is unconstitutional, unlawful and void in that it violates the separation of powers doctrine by directing the seizure from a former President of the United States of his private materials to which neither the public nor Congress are entitled to access.

56. The Act is unconstitutional, unlawful and void in that it purports to be an exercise of Congress' power of eminent domain but in fact condemns and seizes private property of Plaintiff without valid public purpose.

57. The Act is unconstitutional, unlawful and void in that it violates the Fifth Amendment to the Constitution by directing the seizure of Plaintiff's materials without due process of law and by purporting to affect Plaintiff's right to judicial review of the Act, both in a manner devoid of equal treatment to persons similarly situated.

58. The Act is unconstitutional, unlawful and void in that it violates the First Amendment to the Constitution of the United States by directing the seizure of materials which contain, reflect, or record political activities of Plaintiff and others, as well as private activities, for review, use, comment and other purposes by government officials, agencies, private litigants and the general public,

with a consequent chilling effect on Plaintiff's right to free expression and association.

59. The Act is unconstitutional, unlawful and void in that it purports to abrogate a valid contract entered into by Plaintiff pursuant to statutory authorization.

60. The Act is unconstitutional, unlawful and void in that it constitutes a Bill of Attainder or Bill of Pains and Penalties prohibited by Article I, Section 9, Clause 3 of the Constitution of the United States.

61. The Act is unconstitutional, unlawful and void in that it directs the seizure of materials embodying, constituting or reflecting privileged communications between Plaintiff and his wife, attorney, minister and physician.

Injury to Plaintiff

62. The examination, production or disclosure of the Presidential materials by or to persons other than the former President poses an immediate threat to the former President's constitutional rights and privileges. This threat constitutes a significant and irreparable injury which cannot be remedied by an action at law but can only be remedied by injunction.

63. The injury suffered by Plaintiff because of Defendant Administrator's actions in failing to implement the depository agreement impairs his constitutional, legal and contractual rights and privileges. This injury is imminent and irreparable and cannot be compensated by an award of damages. The only adequate remedy is mandamus or injunction in the nature of specific performance of the depository agreement by Defendant Administrator, uninhibited by any official or agent of the United States. Specific performance will not work a hardship upon Defendant.

64. Enforcement and implementation of the Act will irreparably injure Plaintiff's rights and privileges under law and the Constitution of the United States. This injury is imminent and irreparable and cannot adequately be compensated by money damages. Plaintiff's only adequate remedy is an injunction against enforcement and implementation of the Act and a declaration of its invalidity.

V. Relief Requested

WHEREFORE, Plaintiff requests this Court:

(a) to temporarily restrain Defendants from taking any action to enforce or implement the Act and to temporarily restrain Defendants from examining, producing or disclosing, or permitting others to examine, produce or disclose Plaintiff's materials covering the period beginning January 20, 1969 and ending August 9, 1974, which are within their custody and control;

(b) to preliminarily and permanently enjoin Defendants from taking any action whatsoever to enforce or implement the Act;

(c) to declare, adjudge and decree that the Act is unconstitutional, unlawful and void in its entirety;

(d) to the extent the Act is deemed to be valid and to lawfully deprive Plaintiff of his private property, to award just compensation for such deprivation;

(e) to permanently enjoin Defendants from taking any action inconsistent with the terms and conditions of the depository agreement;

(f) to order Defendant Administrator to perform those duties owed to Plaintiff with respect to implementation of the depository agreement pursuant to Title 44 U.S.C. §2107;

(g) Alternatively to (e) and (f), to direct Defendants to return to Plaintiff all Presidential materials referred to herein.

(h) to temporarily restrain and to preliminarily and permanently enjoin Defendants from taking any action to enforce or implement the search and seizure agreement of November 9, 1974; and

(i) to grant such other and further relief as this Court deems just and equitable in the circumstances.

Respectfully submitted,

/s/Herbert J. Miller, Jr.
Herbert J. Miller, Jr.

/s/Raymond G. Larroca
Raymond G. Larroca

/s/William H. Jeffress, Jr.
William H. Jeffress, Jr.

/s/R. Stan Mortenson
R. Stan Mortenson

MILLER, CASSIDY, LAROCCA & LEWIN
1320 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 293-6400

Attorneys for Plaintiff, Richard Nixon

VERIFICATION

District of Columbia, ss:

R. STAN MORTENSON, being first duly sworn under oath, says that upon information and belief the foregoing

is a just and true statement of the facts upon which Plaintiff bases his claim for relief.

/s/R. Stan Mortenson
R. Stan Mortenson, Attorney for
Plaintiff, Richard Nixon

Subscribed and sworn to before me this 20th day of December, 1974.

/s/Carol G. Troiano
Notary Public

[SEAL]

My Commission Expires September 14, 1976

[Caption Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Richard M. Nixon, through his undersigned attorneys, hereby moves this Court for a preliminary injunction, *pendente lite,* (a) prohibiting defendants from taking any action to enforce, execute, or implement the Presidential Recordings and Materials Preservation Act (P.L. 93-526); (b) prohibiting Defendants from taking any action inconsistent with the terms and conditions of the depository agreement of September 7, 1974, between Richard Nixon and Arthur F. Sampson; (c) prohibiting Defendants from taking any action to enforce or implement the November 9, 1974 agreement among the Watergate Special Prosecutor, Philip W. Buchen, Arthur F. Sampson and H. Stuart Knight; and (d) in the

alternative to the relief requested in (b), directing Defendants to return to Plaintiff, forthwith, all presidential materials of the Nixon Administration now within their custody or control.

This motion is made upon the verified complaint in this action, the evidence to be presented at the hearing on this motion, and the various grounds set forth in the accompanying Memorandum.

Respectfully submitted,

/s/Herbert J. Miller
Herbert J. Miller, Jr.

/s/Raymond G. Larroca
Raymond G. Larroca

/s/William H. Jeffress, Jr.
William H. Jeffress, Jr.

/s/R. Stan Mortenson
R. Stan Mortenson

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(202) 293-6400

Attorneys for Plaintiff
Richard Nixon

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate to the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, *et seq.*, all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.

2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.

3. I retain all legal and equitable title to the Materials, including all literary property rights.

4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108(f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.

6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.

7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:

A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

   A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes

shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no diminution of the Administrator's responsibility to protect and secure the Materials from loss, destruction,

unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five-year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,

/s/ Richard Nixon

Accepted by: Arthur F. Sampson
Administrator
General Services Administration

[Caption Omitted in Printing]

APPENDIX TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INDEX

Doc. No.	Description
1.	Memorandum of the Library of Congress, Congressional Research Service, "Ownership of Presidential Papers," dated September 24, 1974
2.	"Resume of Presidential Papers," taken from Statement of Dr. Wayne C. Grover, Archivist of the United States, in Hearings before a Special Subcommittee of the House Committee on Government Operations, 84th Cong., 1st Sess., pp. 39-44 (June 13, 1955)
3.	Letter from James E. O'Neill, Acting Archivist of the United States, to J. William Heckman, Chief Counsel, Senate Subcommittee on Constitutional Amendments, October 9, 1974.
4.	Letter from Herbert Hoover to Franklin Floete, Administrator of General Services, December 15, 1960.
5.	Letter from Harry S. Truman to Jess Larson, Administrator of General Services, January 17, 1953.
6.	Letter from Jess Larson to President Harry S. Truman, January 19, 1953.
7.	Letter from Harry S. Truman to Franklin Floete, Administrator of General Services, February 12, 1957.

8.	Letter from Franklin Floete to Harry S. Truman, March 1, 1957.
9.	Letter from Dwight D. Eisenhower to Franklin Floete, Administrator of General Services, April 13, 1960.
10.	Letter from Jacqueline B. Kennedy, Robert F. Kennedy, and Edward M. Kennedy to Bernard L. Boutin, Administrator of General Services, February 25, 1965.
11.	Letter from Jacqueline B. Kennedy, Robert F. Kennedy, and Edward M. Kennedy to Lawson B. Knott, Jr., Acting Administrator of General Services, May 5, 1965.
12.	Letter from President Lyndon B. Johnson to Lawson B. Knott, Jr., Administrator of General Services, August 13, 1965.
13.	Letter from Lawson B. Knott, Jr. to President Lyndon B. Johnson, August 17, 1965
14.	Affidavit of James E. Rocap, III, with attachments showing current document holdings in Presidential Libraries.
15.	Agreement Between Richard Nixon and Arthur F. Sampson for Deposit of Presidential Materials, dated September 6, 1974.
16.	Presidential Recordings and Materials Preservation Act, P. L. 93-526

[SEAL] THE LIBRARY OF CONGRESS

Congressional Research Service
Washington, D.C. 20540

"OWNERSHIP OF PRESIDENTIAL PAPERS"

By
Vincent E. Treacy
Legislative Attorney
American Law Division
September 24, 1974

[SEAL] THE LIBRARY OF CONGRESS

Congressional Research Service

Washington, D.C. 20540

Traditional Treatment of Presidential Papers As Personal Property

Under a longstanding historical tradition, extending back to the time of George Washington, the papers and records of a President of the United States are regarded as his personal property, subject to his control and ownership. In our view, this traditional and customary treatment constitutes strong, if not conclusive, support for the proposition that Presidential papers are private rather than public property. Several factors which support this conclusion include (1) the weight which should be accorded to contemporaneous construction of the Constitution; (2) the ruling by Mr. Justice Story, while sitting in circuit, on the ownership of Washington's papers; (3) the acquiescence by Congress to the Presidents ownership of his papers, as evidenced by repeated appropriations of public funds to purchase papers from

heirs, and (4) the express congressional support for the principle of Presidential ownership contained in the legislative history of the Presidential Libraries Act of 1955.

Historical Background

The historical treatment of Presidential papers can be summarized briefly. To begin with, President Washington took his papers with him to Mount Vernon when he left the White House. At his death, Washington bequeathed the papers to his nephew, through whom an interest was acquired by Mr. Chief Justice Marshall and by Jared Sparks, author of a life of Washington. Congress also authorized the purchase of Washington's papers from their owners, appropriating $25,000 for that purpose. *Folsom v. Marsh,* 9 Fed. Cas. 342 (No. 4901) (C.C.D. Mass. 184), reprinted at 120 Cong. Rec. S16610 (daily ed. Sept. 16, 1974).

Congress eventually appropriated a total of $45,000 at various times to purchase the papers of George Washington. Congress also paid $20,000 for some of Jefferson's papers, $65,000 for Madison's, $20,000 for Monroe's, and $18,000 for Jackson's. Statement of Wayne C. Grover, Archivist of the United States, at Hearing before a Special Subcommittee of Committee on Government Operations, 84th Congress, 1st Session on Bills to Provide for Presidential Libraries 28 (1955) (hereinafter *"Hearing"*). In addition, $13,500 was expended for President Polk's papers, and $1,000 for those of President Tyler. *Hearing,* at 40-41. The main collections of the papers of most of the Presidents from Washington through Coolidge are located in the Library of Congress. There are a few exceptions: the papers of John Adams and John Q. Adams are held by the Massachusetts Historical Society, and those of Buchanan by the Historical Society of

Pennsylvania. The Hayes Memorial Library and the Harding Memorial Library are located in Tremont, Ohio, and Marion, Ohio, respectively. In most instances, the papers were presented to the Library of Congress or other depository as a gift from the heirs of the former President. *Resume of Presidential Papers,* printed in *Hearing* at 39-44.

Contemporaneous Construction

The principle of contemporaneous interpretation was enunciated by the Supreme Court in *Myers v. United States,* 272 U.S. 52, 175 (1926):

> This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provisions.

In *Powell v. McCormack,* 395 U.S. 486, 546-47 (1969), the Court cautioned that a prior unconstitutional act does not render a later act any less unconstitutional. Nevertheless, the Court indicated that earlier precedents are relevant for the insight they afford in ascertaining the intent of the drafters of the Constitution, and that their precedential value increases in proportion to their proximity to the Convention of 1787.

Folsom v. Marsh

This was a copyright case in which the rights to print both the private and the official papers of President George Washington were in direct issue. The case arose in the Circuit Court for the District of Massachusetts, and was decided by Mr. Justice Story of the United States Supreme Court, sitting as Circuit Justice. The litigation

involved two published works: *The Writings of George Washington,* compiled in 12 volumes by Jared Sparks and copyrighted by him, and *The Life of Washington in the Form of an Autobiography,* compiled by Bela Marsh and his associates.

The publisher of the Sparks compilation brought a bill in equity to enjoin the publication of Marsh's work, alleging that Marsh had pirated the letters of Washington in violation of their copyright protection. Marsh's work consisted of 866 pages, including 388 pages copied verbatim from Spark's compilation.

The defendants answered the allegation of piracy in part by arguing that the letters were public in their nature, not private property, and that they were meant by the author for public use. To this argument, Justice Story responded that it was most manifest that President Washington had deemed the papers to be his own private property, and had bequeathed them to his nephew, through whom Sparks had acquired his interest. Justice Story also noted that Congress had actually purchased the very letters and manuscripts at issue from their owners for the benefit of the nation. He therefore concluded that President Washington had not intended them exclusively for public use, as a donation to the public, and that he had esteemed them of value as his own personal property. Unless there is an unequivocal dedication of private letters and papers by the author to the public or to a private person, Mr. Justice Story held, then "the author has a property therein, and that the copyright thereof exclusively belongs to him."

The Presidential Libraries Act of 1955

The provisions for Presidential archival depositories are set forth in sections 2107 and 2108 of Title 44. Under

these provisions, the Administrator of General Services, when he considers it to be in the public interest, may accept for deposit the papers and other historical materials of a President or former President of the United States, subject to restrictions agreeable to the Administrator as to their use. 44 U.S.C. 2107(1). The Administrator is also authorized to accept land, buildings and equipment to be operated as a Presidential Archival depository, and as part of the national archive system. 44 U.S.C. 2108(1). In negotiating for the deposit of Presidential historical materials, the Administrator is required to "take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials." 44 U.S.C. 2108(c). All such papers, documents, and other historical records are subject to any restrictions on their availability imposed by their depositors or donors. *Id.*

Sections 2107 and 2108 are ultimately derived from section 507 of the Federal Records Act of 1950, Sept. 5, 1950, ch. 849, 64 Stat. 587. The portions of that Act which affected Presidential papers were amended and reenacted in 1955 by the Act of August 12, 1955, ch. 859, 69 Stat. 695 (the Presidential Libraries Act).

Title 44 as a whole was enacted into positive law in 1968. Public Law 90-620, Oct. 22, 1968, 82 Stat. 1238. The legislative history of that Act stressed the fact that no substantive changes were intended by the changes in language made by the codification. See, e.g., Sen. Rep. No. 1621, 90th Cong., 2d Sess. (Oct. 9, 1968).

The 1950 Act authorized the Administrator to accept "the personal papers and other personal historical documentary materials" of the President. 64 Stat. 588. In 1955, this language was broadened to authorize the acceptance of "the papers and other historical materials"

of the President. 69 Stat. 695. This broadened language was preserved by the 1968 codification. 44 U.S.C. 2107 (1970).

In the hearings which led to the enactment of the Presidential Libraries Act in 1955, the Administrator of General Services testified that as a matter of ordinary practice, the President has removed his papers from the White House at the end of his term. This, he testified, was "in keeping with the tradition and the fact that the papers are the personal property of the retiring Presidents." Accordingly, he indicated that the proposed legislation was not mandatory in nature and would not bind future Presidents. Rather, the decision to make the gift would continue to rest with the former President and his heirs. Testimony of Edward F. Mansure, Administrator of General Service, in *Hearing* at 14-15.

There are several other statements in the record of the *Hearings,* expressing the view that a President's papers are his personal property. See, for example, statements by Rep. John W. McCormack, then Chairman of the Subcommittee (*Hearing* at 59), by Rep. Edward H. Rees (*Hearing* at 11), by Wayne C. Grover, Archivist of the United States (*Hearing* at 28), and by David D. Lloyd, Executive Director, Harry S. Truman Library, Inc. (*Hearing* at 52). There was nothing in the House or Senate Reports accompanying the legislation to contradict this assumption. See, S. Rep. No. 1189, 84th Cong., 1st Sess (1955) and H.R. Rep. No. 998, 84th Cong., 1st Sess. (1955).

From the foregoing review, it can be concluded that the traditional treatment of Presidential papers as personal property is supported by an unbroken tradition, a Federal court decision on the point, and positive acquiescence by Congress. Against this must be weighed

the arguments that the Presidents' papers are public property. There is also the related, but distinct, problem of the power of Congress to proclaim the status of such papers, either by statute limited to prospective application, or by a retroactive declaration that the papers of the President are now, and always have been, public property. In addition, it is necessary to examine two recent Federal cases, *Public Affairs Associates v. Rickover* and *Nichols v. United States,* for the light which they shed on the general question.

Presidential Papers as Public Property:

In 1969, Senator John J. Williams of Delaware, in the course of the debate on tax reform, argued that the papers of former Presidents should not be eligible for charitable deductions under the tax laws:

> One of the things that bothers me about getting special tax benefits through the gift of official papers is that the parties doing this are making a profit from the "charitable" giving of what are really official papers which, in my opinion, properly belong to the Government and not to them as individuals. I am sure that in many cases many of the papers are just plain junk, but to the extent that they do have value, they were developed by Government officials on Government time with the aid of Government staff personnel, were typed by Government secretaries on Government paper, and were even stored in Government files. 115 *Cong. Rec.* 20461 (July 23, 1969).

While the foregoing statement is cogent in its logic, it is more difficult to find direct legal precedent, expressly applicable to the Office of the President, in its support.

Public and Private Records

Difficult questions arise from any attempt to distinguish public records from personal or private records. The determination that a particular record is to be regarded as a public record will generally "depend on the purposes of the law which will be served by so classifying it." 417 *MacEwan v. Holm,* 359 P.2d 413; (Ore. 1961). In other words, a record may be a public record for one purpose but not for another. A writing may be a public record for the purpose of making it admissible in evidence without authentication, but not for the purpose of constituting constructive notice to a member of the public. It may be a public record sufficient to warrant judicial notice, but not to require retention under a statute permitting the destruction of certain records. *Id.*

Often, the courts do not key the definition of "public record" to the purpose for which the term is used in the particular instance. Frequently, definitions are borrowed from one field to be applied in others; for example, to decide whether records should be open to public inspection, definitions are sometimes borrowed from cases involving questions other than the right of inspection. The California courts have held that written records are "public writings" only if they are both 1) "official documents" and 2) "the written acts, or records of acts" of public officials. *Mushet v. Dept. of Public Service,* 170 P. 653,655 (Calif. 1917). The Oregon courts, on the other hand, have viewed this limited construction as inappropriate, and have given the terms a liberal construction consistent with the greatest public interest. Accordingly, in Oregon the term "records and files" embraces all writings in the custody of public office, and all such writings are subject to inspection unless there are circumstances justifying non-disclosure. *MacEwan v. Holm,* 359 P.2d 413, 422 (Ore. 1961).

In *Robinson v. Fishback,* a city treasurer had developed a new card index system to the city's assessment rolls for public improvements, and purchased the cards and cases for the system at his own expense. Upon leaving office, he attempted to take the cards with him, but was restrained by an injunction on the grounds that the cards were part of the public records of the office. The Court ruled that the cards were essential to the operation of the assessors office and must, in the public interest, be regarded as public records. *Robinson v. Fishback,* 93 N.E. 666 (Ind. 1911).

In *Polk County v. Parker,* a city assessor asserted ownership of about 601 maps and plats of city real estate which had been planned, executed and drafted by him, for his own use, while not engaged in official duties. He argued that the maps facilitated the work of his office, but were not a part of its records, and that he was entitled to possession of them. The court upheld his right to the ownership of the maps and plats, since he did not make them because of any statutory duty, he was not required to do so as a part of his official duties, and because he made them at times which did not interfere with his official duties.

A. *Polk County v. Parker,* 160 N.W. 320 (Iowa, 1916)

The Problem of Retroactivity

The question has arisen whether a bill making all papers of public officials government property would be constitutional if it applied retroactively to the papers of President Nixon.

While the answer to this question would depend on the language of such a bill, as a general rule the Congress has the power to enact retrospective laws which govern or

control past transactions. This power is subject to two limitations: 1) the *Ex Post Facto Clause* (Art. I, sec. 9, cl. 3) of the Constitution, which is applicable only to criminal statutes, and 2) the Just Compensation Clause of the Fifth Amendment, which is applicable when private property is taken for public use.

Accordingly, a bill controlling the disposition of the official papers of public officials could be made retroactive in effect, as long as it is not a criminal or penal statute, and does not have the effect of "taking" private property for public use. To comply with the *Ex Post Facto Clause,* the proposed bill should not include criminal penalties for violations of its provisions.

The Fifth Amendment problems, however, are more complex. There are two basic approaches: On the one hand, the bill could embody a legislative finding of fact that the official papers of public officials have been public property all along. It could then be argued that the bill would not deprive any person of private property, because the bill would simply declare the public property status of such official papers.

On the other hand, if either Congress or the Courts should determine that the official papers of past public officials were in fact their personal property, then a bill which purported to make those papers public property would be vulnerable to attack on Fifth Amendment grounds. The affected officials could argue that the bill would take their private property for public use, and that they should receive just compensation in cash for their loss. While Congress has the power to make rules governing the disposal of Federal property (Art. IV, sec. 3, cl. 2) and would appear to have an implied power to set the criteria for distinguishing public from private property, a legislative attempt to apply such criteria to

documents to [sic] past officials would be questionable, unless compensation is afforded. The bill introduced by Senator Nelson, S. 4016, reflects this approach by providing for just compensation if the papers are held to be private property. 120 Cong. Rec. §16871 (daily ed. Sept. 18, 1974).

The Rickover Case

The question of the literary rights of a public official in his speeches was litigated in *Public Affairs Associates v. Rickover,* a case which consumed more than eight years in the courts. The original trial court held that a Government official has a literary property right in writings or speeches which have some bearing on, or arise out of his official actions, as long as the writing or delivery of the work is no part of his official duties. Literary products in this category remain the property of the author to the extent that they are protected by the common law and by the law of copyright, and his rights are not affected by the fact that he is a Government officer or employee. *Public Affairs Associates v. Rickover,* 177 F. Supp. 601, 604 (D.D.C. 1959).

The trial court was reversed by the Court of Appeals on the grounds that the distribution of copies of the speeches placed them in the public domain before the copyright had been obtained, thereby forfeiting the copyright. 284 F.2d 262 (D.C. Cir. 1960). The Supreme Court, however, vacated this judgment because of inadequate record, and remanded for a new trial. 369 U.S. 111 (1962). On re-trial limited to two speeches, the fundamental question facing the court was "whether the two speeches fall within the purview of Admiral Rickover's official duties." 268 F. Supp. 444, 448 (D.D.C. 1967). In the court's view, those duties were a matter of contract between Admiral Rickover and the Navy Department.

Noting the broad authority vested in Rickover, the court ruled that, in this context, the duties of a high Government [official] should not be narrowly interpreted. Examining the circumstances of the preparation and delivery of the speeches and the speeches themselves, the court held that the writing and delivery of the speeches formed no part of the Admiral's official duties, and that the speeches were his private property and entitled to copyright. 268 F. Supp. 444, 448-49 (D.D.C. 1967)

The Nichols Case

Nichols v. United States, 460 F.2d 671 (10th Cir. 1972), aff'g 325 F. Supp. 130 (D. Colo. 1971), the plaintiff, a licensed physician and pathologist, sought access under the Freedom of Information Act (5 U.S.C. 551-52), to various materials relating to the assassination. Certain materials, including x-rays and autopsy photographs, had been deposited in the National Archives, subject to restrictions on access imposed under the authority of 44 U.S.C. §§2107 and 2108, pursuant to an agreement between the Administrator of General Services and representatives of the Kennedy estate. The plaintiff challenged the validity of these restrictions on the grounds that the items were the property of the United States not of the Kennedy estate. The Court of Appeals for the Tenth Circuit affirmed the District Courts holding that it was not necessary for the depositor of historical materials to be their "owner" under the statute authorizing deposit. The court also rejected the challenge on the grounds that plaintiff lacked standing to object to the agreement between the Kennedy estate and GSA, since he claimed no ownership in the materials on his own part.

Conclusion

The available legal precedents lead us to the conclusion that the papers and records of a former President must be regarded as his personal property. Opposed to this conclusion is the legal principle that papers produced by public officials in the course of their duties are regarded as public property. This principle has been applied frequently by state and Federal courts; on closer examination, however, it becomes difficult to apply with any certainty to Presidential papers. First, the Presidency is a Constitutional office, equal in status to the Congress and the Judiciary. It would appear that rules applicable to ordinary employees or to lesser public officials do not necessarily govern elected Constitutional offices. For example, the doctrine of executive privilege protects the confidentiality of Presidential conversations and enhances the separation of powers. See *United States v. Nixon,* No. 73-1766, July 24, 1974 (U.S.). No similar privilege attaches to the papers or records of other public officials.

Second, there is no assurance that the test applied in the *Rickover* case could be applied usefully to Presidential papers. It does not appear that a President's time can be divided into "official" time and "personal" time, nor that his papers can be categorized into "public" and "personal" records, in the absence of a statutory standard as authority for the distinction. Third, it does not appear that the tests applied by state courts to establish the status of public records can be usefully applied to Presidential papers, since those tests are so closely related to the specific circumstances of each case. Fourth, the basic holding of the *Nichols* case does not aid in the resolution of this problem, since that case merely confirms the power of GSA to accede to restrictions imposed by a donor of historical materials, regardless of the donor's ownership interest. The fundamental problem

remains—how can the question of ownership be resolved in the absence of statutory standards?

To conclude, there are many cases, involving situations *analogous* to that of Presidential papers, which lend support to the principle of public ownership. The *Folsom* case, however, is *directly* applicable to Presidential papers and has not been overruled or reversed. In our view, the *Folsom* case, coupled with Congressional acquiescence in the traditional treatment of the papers, is controlling.

We must, however, enter the following reservation: The legal status of the papers of a former President is, at the present time, very similar to the status of the doctrine of executive privilege before the Supreme Court decided *United States v. Nixon, supra.* Numerous precedents, both historical and legal, can be arrayed on both sides of the issue. No clear resolution is possible in the absence of a clear court test. While it is our conclusion that the *weight* of precedent and history favors the President's ownership of these papers, it is recognized that new court decisions could alter this result. Therefore, it is recommended that legislation governing Presidential papers be framed so as to afford an early opportunity for judicial resolution of the legal status of these papers.

/s/Vincent E. Treacy
Vincent E. Treacy
Legislative Attorney
September 24, 1974

[SEAL]

United States of America
GENERAL SERVICES ADMINISTRATION

National Archives and Records Service
Washington, DC 20408

October 9, 1974

Mr. J. William Heckman
Chief Counsel
Subcommittee on Constitutional Amendments
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Heckman:

Thank you for your letter of October 2, 1974, requesting information relating to George Washington's possession of those papers originated during his public career as Commander-in-Chief of the Continental Army and as President of the United States. Actually, there is no single recorded statement in which Washington asserted his claim to these papers. However, a series of actions directed by Washington concerning the care and disposition of his papers is well documented in the collection of Washington papers which are deposited at the Library of Congress. It is not surprising that Washington did not make a direct claim of ownership of the papers, since no one questioned his right to the papers.

The papers accumulated by Washington during his first year as Commander of the Continental Army were sent in August 1776 to Congress for safe-keeping prior to an expected British attack on New York City. These papers moved with Congress from Philadelphia to Baltimore and were later transferred to York, Pennsylvania, whence Washington reclaimed them in 1779.

In the meantime, the collection of papers at Washington's headquarters continued to grow, and a group of soldiers who made up the Commander-in-Chief's Guard were assigned the task of keeping them in order. This proved to be an unsatisfactory arrangement; consequently, on April 4, 1781, Washington wrote to the President of Congress requesting authority to hire several clerks to work at a location near his camp arranging and registering the manuscripts. Congress passed a resolution on April 10, 1781, giving Washington the authorization he had requested, and on May 25 Lt. Col. Richard Varick was hired as Washington's recording secretary to direct the work on Washington's papers. Varick established his workshop in Poughkeepsie, New York, at the home of Dr. Peter Tappan. Over the next few years Varick and the clerks worked at transcribing and registering the papers Washington periodically sent to them at Poughkeepsie.

On June 18, 1783, Washington ordered from Daniel Parker of New York "Six strong hair Trunks well clapsed and with good Locks." On November 9 the papers were packed in the trunks and loaded on wagons, and Bezaleel Howe, lieutenant of the New Hampshire line and a member of the Commander-in-Chief's Guard, was placed in charge of the escort that was to take them to Mount Vernon. "As you know," Washington wrote Howe, "[the wagons] contain all my Papers, which are of immense value to me."

In April 1789, when Washington left Mount Vernon for New York to assume his duties as first President of the United States, his papers for the previous years were left at the estate. At the end of his term as President, Washington employed Tobias Lear and Bartholomew Dandridge to separate from his papers those files which were intended for his successor in office, John Adams, and to pack and send the remainder to Mount Vernon.

Soon after he reached Mount Vernon, Washington wrote James McHenry that he planned to erect a building on the estate "for the accommodation & security of my Military Civil & private Papers which are voluminous, and may be interest[ing]."

Washington died at Mount Vernon on December 14, 1799. In his will he bequeathed to his nephew Bushrod Washington along with other personal property, "all the Papers in my possession, which relate to my Civel [sic] and Military Administration of the affairs of this Country . . . [and] also, such of my private Papers as are worth preserving."

The actions taken by Washington to assure the preservation and organization of these papers, to arrange for their shipment to Mount Vernon, and to arrange for their disposition after his death testify to his belief that the papers were his personal property to do with as he wished. No authority at that time considered challenging this belief.

I hope the previous discussion has provided the information you require. Please contact me if I can be of further assistance.

Sincerely,

/s/James E. O'Neill
JAMES E. O'NEILL
Acting Archivist
of the United States

HERBERT HOOVER

The Waldorf Astoria Towers
New York 22, New York
December 15, 1960

Honorable Franklin Floete, Administrator
General Services Administration
General Services Building
Washington 25, D. C.

Dear Mr. Floete:

Through the generosity of friends and the labors of the Herbert Hoover Birthplace Foundation, Inc., a library museum building is now being completed on the Foundation property of some 28 acres at West Branch, Iowa, on which are also situated the cottage in which I was born and various other structures. The holdings of the Foundation, designated collectively as the Herbert Hoover Library Museum, are to be offered as a gift to the United States to house my papers and other historical materials under Section 507 (f) of the Federal Property and Administrative Services Act of 1949, as amended, providing for Presidential archival depositories. I am indeed grateful for this action of the Foundation.

In furtherance of it I hereby offer to the United States, under Section 507 (e) of the Act and subject to the terms hereinafter set forth, all of my collected Presidential papers, wherever they may now be housed, as well as papers accumulated by me prior to my presidency and those accumulated since leaving the White House. These documents will probably number several million papers. My offer also includes other historical materials I have accumulated, such as books, photographs, motion pictures and memorabilia of various kinds. I will transfer

these papers and materials as soon as practicable after the transfer to the United States of the Foundation property, at such time or times as may be agreed upon between the Administrator of General Services, or his designee, and me or my representative. Excluded from this offer are the "war and peace" documents gathered since World War I, including records of such public organizations, which I have given to the War and Peace Library at Stanford University, Palo Alto, California, and which are now located there. There may be some other documents or materials which I or my representative shall determine to be excluded from this offer by reason of private or personal interest on my part or on the part of a member of my family.

My offer is conditioned upon acceptance by the United States of the offer of the land and buildings, known collectively as the Herbert Hoover Library Museum, which is being made by the Herbert Hoover Birthplace Foundation, Inc. My offer is further conditioned upon the agreement of the United States to maintain and operate the Library Museum at all times as a Presidential archival depository, as provided by the Act, for the storage of the papers and other historical materials I propose to give.

The papers and historical materials to be transferred to the United States pursuant to this offer are to be kept at the Library Museum, permanently, provided that the Administrator of General Services, subject to general terms and conditions for the handling and preservation of my papers, which conditions are set forth in a "Statement of Conditions" attached to this letter, and designated as "Annex A," shall have the right in his discretion (a) to make temporary loans to such persons, organizations, or institutions as he shall determine, (b) to dispose by sale, exchange, or otherwise of any such

papers or materials which the Archivist of the United States may determine to have no permanent or historical interest or to be surplus to the needs of such Library Museum, and (c) to remove from said Library Museum any or all such papers or materials if he deems it necessary to preserve them from threatened destruction.

I deem it necessary in the public interest, which is, of course, my interest, to prescribe the conditions contained in "Annex A." This is primarily to protect the many confidences of which the President and former presidents of the United States are the recipients. In addition, the period of time covered by my papers is so extended and the subject matters with which they deal so diverse that I consider it essential, particularly during the period of transfer and initial processing, to operate within these conditions. It is, however, my purpose to make available to the public, through your office, a substantial volume of my papers and historical materials at the earliest possible time and ultimately all of them as the passage of time and events may permit. Toward this end, I am establishing a Coordinating Committee, consisting of my sons and executors, to act with your office in my behalf as I shall direct during my lifetime, and to stand in my stead upon my death for such period of time as may be required. The committee will carry out my broad purpose to give the United States my papers and historical materials for access, while at the same time providing for the safeguarding of the information and its use. It is my expectation that the committee, under my direction, will establish procedures for its oneration and perpetuation to be of maximum effectiveness in furthering my purposes and of optimum assistance to your office.

I wish to express my appreciation to you and to members of your Administration for your counsel in connection with this offer of mine. I believe the offer to

be in accordance with those made to and accepted by you from others under the legislation providing for Presidential archival depositories. I am hopeful that in swift time we may see this Library Museum in operation as one more source of the materials of which the history of this glorious country is made.

With kindest regards,

Yours faithfully,

/s/Herbert Hoover
Herbert Hoover

HERBERT HOOVER

ANNEX A
Statement of Conditions

The following conditions shall govern the papers and other historical materials (as defined in the Act of August 12, 1955, 89 Stat. 695, and hereinafter called Materials) of Herbert Hoover to be transferred to the United States through the Administrator of General Services (hereinafter called Administrator) for deposit in the Presidential archival depository to be established at West Branch, Iowa, under the terms of a letter from former President Hoover to Administrator Floete, dated December 15, 1960, to which this Statement of Conditions is attached as a part.

1. *Persons having access:*

(a) Persons who shall have complete access to the Materials transferred shall be Herbert Hoover (hereinafter sometimes referred to as the Donor), persons designated

by him in writing during his lifetime, and, after his death, persons designated in writing by the Coordinating Committee (hereinafter called the Committee) established by him.

(b) Notwithstanding the foregoing, designated employees of the National Archives and Record Service shall be allowed all access required for the proper performance of normal archival work processes on such materials, not however, to include any publication or any disclosure of such material, under the general supervision of the Archivist of the United States.

2. *Coordinating Committee:*

(a) *Membership:* A Committee is hereby established to serve without compensation and to exercise, after the death of Herbert Hoover, (or during his lifetime as he may designate) all powers referred to in this Statement of Conditions or which Herbert Hoover might have exercised in his lifetime with respect to the Materials. The Committee shall consist of Herbert Hoover, Jr., Allan Hoover, and such others as Herbert Hoover, Jr., and Allan Hoover or the survivor of them may appoint to bring the total member of the Committee to not less than two nor more than five. If vacancies shall occur, Herbert Hoover, Jr., and Allan Hoover or the survivor of them, or after the death of both of them, the then acting member or members of the Committee, shall have power to fill such vacancies by instrument filed with the Committee's Secretary. The Committee shall select its Secretary, and any action taken by the Committee shall be sufficiently evidenced by a certificate in writing made by the Secretary, upon which certificate the Administrator may rely, conclusively.

(b) *Meetings:* Meetings may be held at such place and at such time as the members may from time to time determine, with a majority of the members then acting to constitute a quorum for the transaction of business. The Committee may act without a meeting by any instrument signed by a majority of the members then acting.

(c) *Delegation of Authority:* The Committee may delegate any of its powers to one or more of its members (save the power to appoint new members as set forth in paragraph 2(a) and the power to remove conditions as set forth in paragraph 7 hereof) and may from time to time authorize one or more members, or any agent, to execute and deliver any instrument on behalf of the Committee.

(d) *Amendment:* Herbert Hoover shall by written instrument have the power to alter or amend this paragraph 2, relating to the establishment and functioning of the Coordinating Committee.

3. *General Advice on Indexing, Cataloging, Exhibition and Staffing:*

The Administrator and the Archivist of the United States shall from time to time seek the advice of and confer generally with Herbert Hoover or with the Committee with respect to standards and procedures to be employed in the indexing, cataloging, and exhibition of the Materials, and with respect to the staffing of the Library Museum.

4. *Deposited and Transferred Materials:*

Materials transmitted to the Library Museum from time to time, by the Donor, or the Committee or others on behalf of the Donor, will be designated as Deposited Materials, title thereto to remain in the Donor, or after the Donor's death in the Committee, pending a determi-

nation, to be made during initial processing or as soon thereafter as possible, as to which, if any, of the Deposited Materials are to be excluded because of a personal or private interest of the Donor or a member of his family. Pending transfer of title, Deposited Materials so excluded may be withdrawn at any time by the Donor or Committee. Upon clearance in writing by the Donor or Committee in the event of Donor's prior death, title to Deposited Materials will vest in and transfer to the United States, and thereafter such Transferred Materials shall be administered by the United States in accordance with this Statement of Conditions.

5. *Sealed Materials:*

(a) The following Classes of Materials shall be segregated upon review and placed under seal:

(1) Those that are security-classified pursuant to law or Executive Order, until such classification shall be removed.

(2) Those the use of which may be prejudicial to the maintenance of good relations with foreign nations.

(3) Those containing statements made by or to Herbert Hoover in confidence.

(4) Those relating to the Hoover family or private business affairs, and those relating to the families or private business affairs of others having had correspondence with Herbert Hoover.

(5) Those containing statements about individuals which might be used to embarrass them or members of their families.

(6) Such other Material as Herbert Hoover, or the Committee, or the Administrator may specify.

(b) Materials which have not been reviewed and Materials placed under seal shall not be made available to anyone or their contents divulged to anyone, except persons authorized under the terms of paragraph 1, captioned "Persons having access."

(c) Materials placed under seal shall be reexamined from time to time by the Committee or as the Committee may direct and, subject to the approval of Herbert Hoover or the Committee, shall be opened to research use as soon as the passage of time or other circumstances have removed the conditions that required that they be placed under seal.

6. *Access for purpose of research:*

All competent private persons wishing to use for serious, scholarly research Materials which have been reviewed as provided in paragraph 5 above and which have not been placed under seal as a result of such review, shall be granted equal access thereto under rules and regulations to be prescribed by the Administrator or his designee.

7. *Removal of Conditions:*

Any and all conditions included herein as to any, part of, or all of the Materials shall be released as soon as the passage of time or other circumstances, as determined by both the Administrator and the Donor or the Committee, shall have eliminated the present justification therefor.

8. *Rules and Regulations of the Administrator:*

This Statement of Conditions is not intended to prevent the Administrator or his designee from establishing such rules and regulations deemed desirable by him

for the use of the Materials, which are not in derogation of any of the conditions set forth herein.

9. *Literary Property Rights:*

There are hereby assigned to the United States all of the literary property rights of Herbert Hoover in all his papers which may be transferred to the United States in accordance with the terms and conditions herein expressed, except that there is reserved to Herbert Hoover and his heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that he or they have written or may hereafter write for publication. The foregoing reservation includes the right to license any publisher of such material.

Washington

January 17, 1953

My dear Mr. Larson:

As I am sure you are aware, it is my earnest desire that my personal papers be preserved and ultimately made available for historical research. You are also familiar with the project to raise funds by private subscription for the construction of a library at Grandview, Missouri, to serve as a depository for these and other papers and documentary materials deemed to be of potential interest to scholars. It is the intent of the sponsors of the project to present the library building and grounds to the United States if the Congress by appropriate legislation will accept the property and provide for its maintenance and operation. It would be my wish upon consummation of such an arrangement that title to my papers deposited in the library pass to the United States and the papers themselves become a part of the National Archives.

I therefore propose, as a preliminary step toward such a disposition, to offer my personal papers for deposit in the National Archives pursuant to the provisions of section 507(e) of the Federal Records Act of 1950.

Members of my staff have been discussing with representatives of your Administration certain problems in connection with the custody, storage, and review of the papers pending the completion of the library project and the making of a definitive offer to deposit. I am advised that the plans outlined herein are in accord with the conclusions reached at these conferences.

My personal papers consist mainly, of course, of those accumulated by me during my tenure as President of the United States, but there are some which I acquired while Vice President and Senator, and others which relate to earlier periods in my life.

I propose to retain all of these in my personal possession when I leave office, and to move them to a secure place of storage under guard in Kansas City, Missouri. There I intend to review them and prepare them for ultimate deposit under section 507(e) of the Records Act. I am requesting you to designate two or three experienced archivists to work with me on this project. I should expect to be consulted regarding the particular individuals to be assigned to the work.

It is my understanding that you have the authority to detail personnel to review or assist in the review of the papers, preliminary to and in connection with a proposed offer for deposit under the provisions of section 507(e) of the Records Act, and that this power is derived from the provision of section 507(a)(3) of the same Act authorizing you "to direct and effect the transfer of materials from private sources authorized to be received by the Administrator by the provisions of subsection (e) of this section."

As has been indicated, this letter is not to be construed as a definitive offer for deposit within the meaning of section 507(e) of the Records Act, but only as a prreliminary offer or proposal to deposit. It is my firm intention, however, to offer the great bulk of my personal papers for deposit under the cited section or under whatever similar provision is included in the acceptance legislation in the event that the proposed library at Grandview is constructed and is accepted by the Congress. Alternatively, if the project for construction of the library should be abandoned or fail of accomplishment within a reasonable time, I intend to make an offer for deposit under section 507(e), and to make appropriate provision therefor in my will.

It is not my purpose to pass title to any of my personal papers at this time by virtue of the proposals outlined herein nor to make any binding commitment as to just what papers will be offered for deposit. There will be some few papers which for sentimental reasons I may wish to give to relatives or friends. There will undoubtedly be in the files many papers having no historical value either because they are duplicated elsewhere in official records or because they were of purely transitory interest. Such items can be eliminated in the course of the reviews contemplated, so that the material deposited will not be unnecessarily voluminous.

During the interval prior to deposit of the papers, I expect to be working on them and using them to refresh my recollection, consequently I wish to keep them available for my use in connection with my studies and any writing I may do.

Furthermore, I contemplate that when my offer for deposit is made I shall impose restrictions upon the use of certain of the papers for varying periods as may be

authorized by law. Such restrictions have customarily been imposed by my predecessors or their heirs in making deposits of Presidential papers.

I hope that satisfactory arrangements for the preservation and eventual deposit of my papers in the National Archives can be worked out along the lines indicated above.

Sincerely yours,

/s/Harry S. Truman

Honorable Jess Larson,
Administrator
General Services Administration
Washington, D.C.

GENERAL SERVICES ADMINISTRATION

January 19, 1953

The President
The White House
Washington 25, D. C.

Dear Mr. President:

I have your letter of January 17, 1953, concerning the disposition and care of your personal papers. I have long been aware that you consider the possession of these papers a public trust and that you wish ultimately to make them available to scholars in a library to be constructed at private expense at Grandview, Missouri. In your letter, you tell me of your hope that the papers and the library housing them will be accepted as a gift to the

Government of the United States and maintained as a part of the National Archives, and that it is your intention to offer to make such a gift of most, if not all, of your papers for that purpose, to the end that eventually they will thus be deposited in the National Archives with the title passing to the United States.

Meanwhile, pending the construction of the library, the question arises as to the temporary disposition, safekeeping, and care of these very valuable sources of historical information. You desire, as all of your predecessors have done, to have your personal papers in a place of safekeeping near your place of residence so that you may have access to them. You have therefore arranged to have the papers transferred to a secure storage place under guard in Kansas City, where they will be under your control.

You advise that, in connection with the temporary storing of the personal papers you would like to have the services and the advice of at least two experienced, professional archivists, in order to assist in and help to supervise the work of classifying, arranging, and selecting the papers for their eventual transfer to the United States.

By virtue of your proposal to offer your papers for deposit pursuant to section 507(e) of the Federal Records Act, subject to the qualifications stated in your letter, the General Services Administration can, as you request, under the provisions of section 507(a)(3) of that Act, assign two achivists to assist you, to the extent you may desire, in the task of arranging, classifying, indexing, and packing the papers in preparation for ultimate deposit. It is, of course, essential that you be consulted regarding the particular individuals to be designated to assist you in this task. There is no reason why their work

should interfere with your use of these papers for the purposes indicated in your letter. Indeed, it should facilitate your use of them.

Not only historians and archivists, but all the people, are indebted to you for your interest in seeing your papers properly preserved and made available in due time for scholarly research, so that the complete story of today's events may serve as a guide to future generations.

Sincerely yours,

/s/Jess Larson
Administrator

HARRY S. TRUMAN
Federal Reserve Bank Building
Kansas City 6, Missouri

February 12, 1957

Honorable Franklin G. Floete
Administrator of General Service
General Services Administration
Washington 25, D. C.

Dear Mr. Floete:

As you know, it has long been my desire to give to the United States the papers accumulated during my years in public office and the other historical materials, mementos, objects of art and other memorabilia acquired by me as President during my term of office, to the end that the people may have those things available for study and research, and for their enjoyment and education. In pursuit of this objective, a Library building has been

constructed in the City of Independence, by public subscription, suitable for housing, preserving and exhibiting these papers and materials. This building is now nearing completion, and it is the intention of the Harry S. Truman Library, Inc., the non-profit corporation which has financed and erected it, to present it as a gift to the United States on certain conditions, and provided the United States will maintain, operate and protect it as a Presidential archival depository as provided in the Federal Property and Administrative Services Act of 1949 as amended (65 Stat. 695).

At this time, therefore, under the terms of the said statute, I offer my papers and other historical materials as hereinafter described to the United States on condition that they will be preserved and made available pursuant to restrictions imposed by me, and on condition that they be accepted by the United States on the terms and provisions hereinafter set forth.

1. I offer to the United States all my right, title and interest in my papers now stored in the Memorial Building on Maple Avenue and Pleasant Street in the City of Independence, Missouri. These include substantially all the papers which were in the files of the White House when I relinquished the office of President. They also include a number of other files accumulated by me in my public offices prior to that time, and are estimated to total several million documents.

2. I offer to the United States all my right, title and interest in my other papers relating to my public offices wherever located or stored, with the exception of certain papers determined by me, or in the event of my death by my executors or personal representatives, prior to the transfer thereof, to be related in whole or in part to the business or personal affairs of myself or my family

(which term as used in this offer shall include my wife, mother, daughter, brother, sister, nephews or nieces).

3. I offer to the United States all the other historical materials collected during my tenure of public office now belonging to me which are located in Jackson County, Missouri, or elsewhere, other than in my private residence in the City of Independence, Missouri, and which shall not prior to the transfer thereof be marked, labelled or otherwise designated to show a reservation of title in me, or which shall not have been received for the business or personal use of myself or my family. The term "historical materials" as used in this offer shall bear the same meaning as defined in the Federal Property and Administrative Services Act of 1949 as amended (69 Stat. 695).

4. The offers contained in paragraphs 1, 2 and 3 hereof shall lapse and become ineffective unless within one year from the date hereof the United States shall accept the offer of the Harry S. Truman Library and the land surrounding said building now under construction in the City of Independence, Missouri, and shall agree to maintain and operate it at all times thereafter as a Presidential archival depository for the storage of the papers and the other historical materials included in such offers in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 as amended.

5. Upon the acceptance and agreement mentioned in the preceding paragraph, the papers described in paragraph 1 will be transferred to the United States for storage in said building as soon as possible; and the papers and historical materials described in paragraphs 2 and 3 hereof shall be transferred from time to time as shall be agreed upon by the Administrator of the General Services Administration and me or my executors or representatives.

6. I or my executors or personal representatives shall be the sole judge of (a) which papers relate to my various public offices and which relate to the personal or business affairs of myself or my family, and (b) which of my other historical materials were received for the business or personal use of myself or my family.

7. All papers and other historical materials which shall be transferred pursuant to the foregoing to the United States shall be kept permanently in the said Harry S. Truman Library, after the United States shall have accepted and agreed to maintain it as set forth in paragraph 3, subject to the right of the Archivist of the United States in his discretion (a) to make temporary loans thereof to such persons, organizations or institutions as he shall determine, (b) to dispose by sale, exchange or otherwise of any such papers or historical materials which he may determine to have no permanent value or historical interest or to be surplus to the needs of the Harry S. Truman Library, and (c) to remove from the said Library any and all of such papers or historical materials if he shall deem it necessary to preserve them from threatened destruction.

8. All papers transferred by me or my representatives to the United States shall be freely accessible at all reasonable times to me or to persons designated by me in writing during my life or after my death to the persons designated by me in my will.

9. It is my purpose to make the papers and other historical materials referred to herein available for the purpose of study and research as soon as possible and to the fullest possible extent. However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional

office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and classes of papers for varying periods of time.

Therefore, for the time being, the following classes of papers shall be withheld from inspection by, and their contents shall be kept confidential and shall not be divulged to, anyone (including public officials) other than (1) regular employees of the National Archives and Record Service performing normal archival services on such papers under the general supervision of the Archivist of the United States, and (2) myself and persons authorized by me in my will or otherwise to have access to such papers on my behalf, pursuant to paragraph 8 hereof:

(a) Papers that are classified as to secrecy and security pursuant to law until such classification shall be removed. Such classification shall be reviewed from time to time; and

(b) Papers containing statements which may in any manner injure, embarrass or harass any living person or the living members of the family of any deceased person, or papers which may in any manner be prejudicial to the conduct of foreign relations with any government, or papers containing statements made by or to me in confidence in any official capacity.

10. Subject to my approval or the approval of the persons designated by me in my will or otherwise to act after my death with respect to these papers and historical materials, the employees of the National Archives and Record Service may perform the services necessary to the classification of the papers in accordance with the foregoing paragraph, and may place any withheld papers

in special files where they shall be available only to me or to such persons or employees.

11. All papers withheld in accordance with the foregoing provisions shall be reexamined from time to time by employees of the National Archives and Records Service under the direction of the Archivist of the United States and, subject to approval by me or by persons designated by me in my will or otherwise to act after my death with respect to those papers and historical material shall be opened to general use as soon as the passage of time or other circumstances have removed the conditions that justify their being temporarily withheld.

12. All competent private persons interested in using the papers for purposes of serious scholarly research shall be granted equal access to the papers that are not withheld in accordance with the foregoing.

13. I hereby assign to the United States all my literary property rights in all papers which may be transferred to the United States in accordance with the terms and conditions herein expressed, except that I reserve to myself and my heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that I have written or may hereafter write for publication. The foregoing reservation includes the right to license any publisher of such material.

Sincerely yours,

/s/Harry S. Truman
Harry S. Truman

GENERAL SERVICES ADMINISTRATION

March 1, 1957

Honorable Harry S. Truman
Federal Reserve Bank Building
Kansas City, Missouri

Dear President Truman:

In accordance with the powers vested in me by the Federal Property and Administrative Services Act of 1949, as amended, it is my pleasure to inform you that your offer of certain documents and other historical materials contained in your letter of February 12, 1957, is acceptable under the conditions which you have prescribed.

Accordingly, on behalf of the United States I accept the offer subject to those conditions. This acceptance, like your offer, is of course, conditioned upon the acceptance by the United States of the offer of the land, building and equipment. I enclose a copy of my reply to Mr. O'Connor's letter on behalf of the Harry S. Truman Library, Inc.

I am convinced that your making these materials available for research within the splendid facilities of the Truman Library offers both the public and scholars a remarkable opportunity to achieve an insight into the history of our times. Let me also say that it has been a pleasure to work with you and your staff in making the necessary preparations for this significant acquisition into the national archives system.

Sincerely yours,

/s/Franklin G. Floete
Administrator

THE WHITE HOUSE
Washington

April 13, 1960

Dear Mr. Floete:

The papers of a President, which from the time of George Washington have been regarded as the personal property of the President, have, inescapably, a direct and important association with the history of our country. Believing that they should be permanently and generally available for study, I desire that my papers should be made so available and believe that this can best be done through a Presidential archival depository, as provided by the Federal Property and Administrative Services Act of 1949, as amended.

The Eisenhower Presidential Library Commission, an agency of the State of Kansas, now has under construction in the City of Abilene a library building, financed by public subscription, where it is proposed to house my Presidential and other papers. This building is appropriately situated on land adjacent to my boyhood home and to a museum, both of which are maintained by the Eisenhower Foundation, a non-profit corporation organized under the laws of Kansas.

When the Library building has been completed, the Commission intends to present it, together with equipment and grounds, as a gift to the United States, on condition that the United States will maintain and operate this Library as a Presidential archival depository under the provisions of the above cited Act.

Therefore, in furtherance of this plan and in accordance with the provisions of that Act, I now offer as a gift to the United States such of my papers and other

documentary materials as are hereinafter described, on condition that these papers and materials will be accepted, preserved, and made available by the United States under the following terms:

1. Upon the close of my term in office, I shall cause to be transferred to the United States for deposit in the Library at Abilene the bulk of my papers in the White House office, estimated to include several million documents.

2. Other documents, still in my possession, including the remainder of my Presidential papers, the papers accumulated by me before my inauguration as President, and other documentary materials, including books, still pictures, motion pictures, and sound recordings, shall be transferred to the United States for deposit in said Library from time to time as shall be agreed upon by the Administrator of General Services or his representative and me or my representative, except those papers and other documentary materials which shall, before or after my leaving the Office of President, be determined by me or my representative to be excluded from this offer by reason of private or personal interest in such papers or materials on my part or on the part of a member of my family.

3. The offer of the papers and other materials described in paragraphs 1 and 2 hereof is conditioned upon acceptance by the United States of the offer of the land and buildings comprising the Eisenhower Library at Abilene, Kansas, and upon its agreement to maintain and operate the Library at all times thereafter as a Presidential archival depository for the storage of

such papers and other materials, in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended, such acceptance and agreement to be effected within 90 days after the end of the period described in the second proviso to section 507(f)(1) of said Act.

4. All papers and other documentary materials which shall be transferred to the United States pursuant to the foregoing shall be kept in the Library permanently, subject to the right of the Administrator of General Services in his discretion (a) to make temporary loans thereof to such persons, organizations, or institutions as he shall determine, (b) to dispose by sale, exchange, or otherwise of any such papers or documentary materials which the Archivist of the United States may determine to have no permanent or historical interest or to be surplus to the needs of said Library, and (c) to remove from said Library any or all such papers or documentary materials if he deems it necessary to preserve them from threatened destruction.

5. All papers and other documentary materials transferred to the United States pursuant to the foregoing shall be accessible at all reasonable times to me, my son, my representative, or to other persons authorized in writing by me or my son to have access to such papers.

6. It is my purpose to make the papers and other documentary materials donated to the United States by the terms of this instrument available for purposes of serious research as soon as possible and to the fullest extent possible.

However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidences is essential to the functioning of the office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and classes of papers for varying periods of time. In pursuance of this objective and in accordance with the provisions of Section 507(f)(3) of the Federal Property and Administrative Services Act of 1949, as amended, conditions are imposed on the use of my papers as provided in paragraphs 7 through 10 immediately following.

7. Subsequent to the execution of this instrument, the Administrator of General Services shall have the papers that are transferred to the United States reviewed and shall place under seal the following classes of materials:

   a. Papers that are security-classified pursuant to law or Executive Order, until such classification shall be removed.

   b. Papers the use of which may be prejudicial to the maintenance of good relations with foreign nations.

   c. Papers containing statements made by or to me in confidence.

   d. Papers relating to my family or private business affairs, and papers relating to the families or private business affairs of persons who have had correspondence with me.

   e. Papers containing statements about individuals which might be used to injure or harass them or members of their families.

   f. Such other individual files as I, or my representative, or the Administrator of General Services may specify.

8. Papers placed under seal shall not be made available to anyone or their contents divulged to anyone (including public officials) except (a) persons authorized under the terms of paragraph 5 above, and (b) officials and employees of the National Archives and Records Service when performing essential archival work processes on such papers under the supervision of the Administrator of General Services.

9. All papers placed under seal in accordance with the foregoing provisions shall be reexamined from time to time by officials and employees of the National Archives and Records Service under the direction of the Administrator of General Services and, subject to approval by me or my representative, shall be opened to research use as soon as the passage of time or other circumstances have removed the conditions that required that they be put under seal.

10. All competent private persons interested in using my papers for serious scholarly research shall be granted equal access to those that are not withheld from use according to the foregoing, subject to the regulations issued by the Administrator of General Services governing the use of papers and other documentary materials in the Library.

11. Title to my papers and other documentary materials and the literary property rights in my papers, shall pass to the United States as such papers and materials are transferred to the United

States under the terms and conditions herein expressed, except that I reserve to myself and to my heirs (a) a right to make any use of any of these papers in writing for publication, and (b) literary property rights in any works that I have written or may hereafter write for publication. These reservations include the right to license any publisher of any such work.

12. My representative for purposes of paragraphs 2, 5, 7, 8 and 9 shall be such person or persons as I may designate in a letter filed with the Administrator of General Services. In the event that at any time after my death there should be no representative so designated, my representative shall be my son John Eisenhower, or such person or persons as he may designate in the same manner.

The detailed conditions described in this letter have been drawn up in accordance with known precedents and with the cooperation of officials of your office and of the National Archives. Permit me to express my deep appreciation of the help that all these individuals have given me.

With personal regard,

Sincerely,

/s/Dwight V. Eisenhower

The Honorable Franklin Floete
Administrator of General Services
Washington, D.C.

Honorable Bernard L. Boutin
Administrator of General Services
Washington, D.C. 20405

Dear Mr. Boutin:

FIRST: The late John Fitzgerald Kennedy had said many times both publicly and privately that it was his intention to place certain of his papers and other historical materials in a Presidential archival depository in Massachusetts, in the form of a Library bearing his name, and had encouraged, and participated in, and arranged for the planning of such an institution.

SECOND: Accordingly, in fulfillment of such stated intention and arrangement, it is our desire to give and deliver to the United States of America for the purpose of ultimate deposit in the said Presidential archival depository in Massachusetts, the papers, documents, historical materials, mementos, objects of art, and other memorabilia, including books, motion pictures, still pictures and sound recordings, hereinafter called "Materials," formerly belonging to and relating to the life and work of John Fitzgerald Kennedy, and which he intended should be so deposited.

THIRD: Therefore, we, the undersigned Jacqueline Bouvier Kennedy and the Executors and Trustees of the estate of John Fitzgerald Kennedy, deceased, hereinafter called the "Donors," hereby convey, assign, give, and donate to the United States of America, hereinafter called the "Donee," effective as of November 22, 1963, and subject to the conditions and restrictions hereinafter set forth, all of our right, title, and interest to the Materials above described, hereinafter called "Materials," as our right, title, and interest may appear, including but not limited to those Materials now stored at the White House, the Executive Office Building, The National

Archives Building, or at such other place or places where such Materials may be found, subject, however, to the specific understanding and agreement that:

(i) This gift and transfer shall not and is not intended to apply to or embrace such items as John Fitzgerald Kennedy had not intended to be deposited in said Presidential archival depository, or which are determined by the Donors to be of special or private interest to the personal, family and business affairs of John Fitzgerald Kennedy, his wife and children, parents, brothers and sisters.

(ii) The Donors shall have and specifically reserve the right to retain title and possession and to regain possession of any items that the Donors in their sole discretion may determine in accordance with this paragraph the Third are excluded from the purview of this gift, irrespective of the fact that such items may have been theretofore delivered to the Donee.

(iii) For the purposes of effectuating the provisions of subparagraphs (i) and (ii) of this paragraph the Third, the Donors shall have and specifically reserve the right to examine, at any time or from time to time prior to January 1, 1967, either themselves or through authorized representatives, any Materials from time to time in the possession or custody or under the control of the Donee, and wheresoever the same may be situated, for the purpose of determining and designating any such Materials as being excluded from the purview of this gift, provided, however, that examination of security-classified information shall be in accordance with applicable law or Executive Order relating to security-classified defense information.

(iv) Thus we shall, as soon as is reasonably possible, and upon written notice from the Donors of such designation, deliver to the Donors any items so designated by the Donors pursuant to subparagraph (iii) of this paragraph the Third as excluded from the purview of this gift.

(v) Mrs. Jacqueline Bouvier Kennedy shall have and specifically reserves the right to borrow from the Donee without formality such materials to which this transfer applies as she may wish for her personal use, examination, or display either by herself or by anyone she may select or approve, and any Material so borrowed shall be returned to the Donee within a reasonable period of time.

FOURTH: All Materials to which this transfer is applicable shall be maintained by the United States and stored at such place or places as may be designated by the Administrator of General Services until the completion and acceptance by the United States, pursuant to section 507(f) of the Federal Property and Administrative Services Act of 1949, as amended, of the proposed John F. Kennedy Library, at which time the Materials shall be deposited in that Library and administered in accordance with the pertinent provisions of that Act.

FIFTH: It is the Donors' wish that all Materials donated to the Donee hereunder be made available for research use as soon as possible and to the fullest extent possible. The Donors, however, desire to guard against the possibility of the Materials being used to injure, embarrass, or harass any person and otherwise properly to safeguard the interests of the United States. Therefore, all Materials to which this transfer applies are accepted and shall be held by the Donor subject to the following restrictions and conditions:

(i) Donors shall have and hereby reserve the right to restrict the use and availability of any Materials to which this transfer applies, and irrespective of the time when such Materials may have been, or may be delivered to the Donor, for such time or times as the Donors in their sole discretion may from time to time or at any time specify, and such restrictions shall be adhered to and observed in all respects for as long a period as the Donors shall have specified or until such restrictions are revoked or terminated by the Donors or by persons legally qualified to act on their behalf with respect thereto. Any Materials so designated in writing by the Donors as restricted shall be known and are hereinafter referred to as "Donors' Restricted Material," and shall be placed under seal, it being understood, of course, that Donor Restricted Materials shall be accessible to the Archivist of the United States or designated members of his staff for the performance of such archival work processes as may be requested by the Donors, but not otherwise.

(ii) The Archivist of the United States or designated members of his staff shall review the Materials to which this transfer is applicable, except Donors Restricted Material, for the purpose of classifying such Materials. Any Materials which fall within the following categories shall be designated by the Archivist and are hereinafter referred to as "Archivist Restricted Material," and shall be placed under seal:

(a) Materials containing statements which may in any manner be used to injure, embarrass, or harass any person, or Materials which may in any manner be prejudicial to the conduct of foreign relations of the United States of America, or materials containing statements made by or to John Fitzgerald Kennedy in confidence.

(b) Defense information that has been security-classified pursuant to law or Executive Order: *Provided that* such information may be declassified or otherwise made available in accordance with the procedures established by law or Executive Order governing availability of security-classified information.

(c) Materials that relate to the personal, family, and business affairs of John Fitzgerald Kennedy and his family, including such affairs of Mrs. Jacqueline Bouvier Kennedy, and the mother, father, sisters, and brothers of John Fitzgerald Kennedy.

(iii) The review and classification of the Materials hereinabove provided for shall be performed by and in collaboration between the Donors or their designated representatives and the Administrator of General Services or his delegatees and shall be completed within the shortest reasonable period of time after the Materials have been deposited in the John Fitzgerald Kennedy Library in Massachusetts.

(iv) Until such time as the review and publication of the Materials, as hereinabove provided for, has been completed, no person shall be permitted access thereto except the donors, persons given written authorization by the donors, and employees of the General Services Administration performing archival work processes on such Materials, provided, however, that access to Materials which are security-classified shall be in accordance with applicable law and Executive Order relating to security-classified defense information.

SIXTH: Except as otherwise provided herein, all Archivist Restricted Materials shall be available only to

employees of the General Services Administration performing archival work processes on such Materials and to the Donors or other persons given written authorization by any of the Donors, provided, however, that access to Archivist Restricted Materials which are security-classified shall be in accordance with applicable law or Executive Order relating to security-classified defense information.

SEVENTH: The archivist of the United States or his designated representative shall review from time to time Archivist Restricted Materials, and shall remove the restriction from such materials and make them available for research use as soon as the passage of time or other circumstances no longer require their being kept under restriction, provided, however, that notwithstanding anything otherwise or to the contrary in this instrument contained, no restrictions shall be removed in respect of the materials described in Article *Fifth* ii (c) without the prior written consent of the donors.

EIGHTH: The Donors hereby assign to the United States of America all of their literary property rights in all Materials, excluding Donors' Restricted Material during the period of restriction, except that the donors reserve to themselves (a) the right to make any use of such Materials and (b) all literary property rights in any manuscript or other writings that John Fitzgerald Kennedy wrote for publication, including the right to license the publication of such material.

NINTH: All competent persons interested in using the materials for purposes of serious research shall be granted equal access to unrestricted materials.

TENTH: As used herein, the word "Donors" shall mean Mrs. Jacqueline B. Kennedy, and the Executors of and the Trustees under the Last Will and Testament of John

Fitzgerald Kennedy from time to time qualified and serving.

/s/Jacqueline B. Kennedy
Donor

/s/Jacqueline B. Kennedy
/s/Robert F. Kennedy
/s/Edward M. Kennedy
Donors

By virtue of section 507(e) of the Federal Property and Administrative Services Act of 1949, as amended (44 U.S.C. 397(e)), the foregoing gift of the papers and other historical materials of the late President John Fitzgerald Kennedy is accepted.

THE UNITED STATES OF AMERICA
Acting by and Through
/s/Lawson B. Knott, Jr.
Acting Administrator of
General Services

Date: February 25, 1965

May 5th, 1965.

Honorable Lawson B. Knott, Jr.
Acting Administrator
General Services Administration
Washington, D.C. 20405

Dear Mr. Knott:

Reference is made to the Agreement between the United States of America and Mrs. Jacqueline B. Kennedy and

the Executors of the Estate of John F. Kennedy dated February 25, 1965, concerning the transfer of materials formerly belonging to and relating to the life and work of John Fitzgerald Kennedy to the United States of America.

Notwithstanding any of the restrictions imposed on access to the materials in the referenced February 25, 1965 Agreement, except the materials specified in Article Fifth ii(c) thereof, the Archivist of the United States is authorized to make available to President Lyndon B. Johnson, while in office, any materials or information with respect thereto, relating to or required in connection with the transition of the Office of President from the late President John F. Kennedy to President Johnson, or otherwise requested by President Johnson in connection with performance of the duties of the Office of President.

/s/Jacqueline B. Kennedy
Donor

/s/Jacqueline B. Kennedy
/s/Bob Kennedy
/s/Edward Kennedy
Donor

Exhibit B

THE WHITE HOUSE
Washington

August 13, 1965

Dear Mr. Knott:

It has long been my belief that the papers and other historical materials of a President constitute a vital part

of our Nation's historical heritage and that such papers and materials should be permanently preserved and made available for scholarly research and study.

You are aware that it also has long been my intention to donate my papers and other historical materials to the United States for ultimate deposit in a Presidential Archival Depository as provided by Section 507(f) of the Federal Property and Administrative Services Act of 1949, as amended (44 U.S.C. 397(f)).

You are also aware that the University of Texas has advised me of its intent, consistent with its educational purposes and objectives, to provide, as its expense, an appropriate site within the principal academic environs of the University of Texas, and to construct thereon a suitable Presidential Archival Depository to be known as the Lyndon Baines Johnson Library and to turn over, dedicate, and make available the space and facilities so to be constructed, furnished, and equipped by it, to the United States for its use in perpetuity pursuant to the aforesaid authority, as a Presidential Archival Depository for the housing, preservation, display, and appropriate use of my Presidential papers and other historical materials.

I have indicated to the University of Texas and publicly announced my approval of its proposal.

Accordingly, and in furtherance of the public purposes which will thus be served, I hereby offer as a gift to the United States for the purpose of ultimate deposit in the said Presidential Library my Presidential and other papers, documents, historical materials, mementos, objects of art, and other memorabilia, including books, motion pictures, still pictures, and sound recordings, all hereinafter called "Materials" belonging to me or in my possession which relate to my life and work, subject to

the condition that these Materials be accepted, preserved, and made available by the United States under the following conditions:

1. As an initial step the Materials shall be accepted by the United States for deposit in the National Archives pursuant to Section 507(e) of the Act, supra, until the completion and acceptance by the United States of the above-described Lyndon Baines Johnson Library at which time the Materials shall be deposited in that Library and administered in accordance with the pertinent provisions of the Act, supra.

2. It is my purpose to make the papers and other historical materials referred to herein available for the purpose of study and research as soon as possible and to the fullest possible extent. However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and classes of papers for varying periods of time. Therefore:

(a) I hereby reserve the right to restrict the use and availability of any Materials to which this agreement applies, irrespective of the time when such Materials may have been, or may be delivered to the United States, for such time as I, in my sole discretion, may from time to time specify, and such restrictions shall be adhered to and observed in all respects for as long a period of time as may be specified or until such restrictions are revoked or terminated by me or persons authorized to act on my behalf with respect thereto, or as otherwise provided in this agreement.

(b) During my tenure as President of the United States any Materials accepted and deposited pursuant to paragraph 1, above, shall be made available by display or otherwise for public inspection, research or other use subject to restrictions (1) imposed at time of delivery of possession thereof to the United States; (2) as otherwise provided for in this agreement; and (3) as may be imposed by me or by persons authorized to act for me with regard thereto.

(c) Archival personnel of the United States designated by the Administrator of General Services shall review the Materials to which this agreement applies and any Materials in the following categories shall be placed under seal of restriction:

(i) Materials containing statements which may in any manner be used to injure, embarrass, or harass any person, or Materials which may in any manner be prejudicial to the conduct of foreign relations of the United States of America, or Materials containing statements made by or to me in confidence.

(ii) Defense information that has been security classified pursuant to law or Executive order: *Provided that* such information may be declassified or otherwise made available in accordance with the procedures established by law or Executive order governing availability of security-classified information.

(iii) Papers relating to my family or private affairs, and papers relating to the families or private affairs of persons who have had correspondence with me.

(d) All Material restricted pursuant to this agreement shall be reviewed from time to time by Archival personnel designated by the Administrator of General Services, the restrictions removed therefrom, and the Materials made available for public display and research use as soon as the passage of time or other circumstances no longer require such Materials being kept under restriction: *Provided that* restrictions imposed on Materials by paragraph 2(b), above, shall not be removed during my tenure as President without my personal approval or the approval of persons authorized to act for me with respect thereto.

(e) Materials placed under restriction pursuant to this agreement shall not be made available to anyone or their contents divulged to anyone (including public officials) except (1) persons authorized under the terms of paragraph 5 below and (2) Archival personnel designated by the Administrator of General Services when performing essential archival work processes on such papers under the supervision of the Administrator of General Services: *Provided that* access to security-classified materials shall be made available in accordance with the procedures established by law or Executive orders.

3. All unrestricted materials shall upon (a) deposit in the Lyndon Baines Johnson Library and (b) expiration of my tenure as President, be made available for public display and inspection, and made equally accessible to all competent private persons interested in using the materials for study and scholarly research purposes subject to regulations issued by the Administrator of General Services governing the use of materials in the Library: *Provided that* such

materials may be made available for display, inspection and research purposes prior to the expiration of my tenure as President with my personal approval.

4. This offer shall not and is not intended to apply to or embrace such items which I determine to be of special or private interest to the personal and family affairs of myself, my wife and children, and I specifically reserve the right to retain title and possession and to regain possession of any such items that I, in my sole discretion, may determine to be excluded from the purview of this gift, irrespective of the fact that such items may have been theretofore delivered to the United States.

5. All Materials transferred to the United States pursuant to this agreement shall be freely accessible to me or my wife or to persons designated by me in writing, subject to the provisions of applicable law and Executive orders governing availability of security-classified information.

6. Subject to restrictions imposed by or pursuant to this agreement, all Materials transferred to the United States pursuant to this agreement shall be subject to the right of the Administrator in his discretion (a) to make temporary loans thereof to such persons, organizations or institutions as he shall determine; (b) to dispose by sale, exchange or otherwise of any such papers or historical materials which he may determine to have no permanent value or historical interest or to be surplus to the needs of the Lyndon Baines Johnson Library; and (c) to remove from the said Library any and all of such papers or historical materials if he shall deem it necessary to preserve them from threatened destruction.

7. I hereby assign to the United States all my literary property rights in all papers transferred to the United States in accordance with the terms and conditions of this agreement, except that I reserve to myself and my heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that I have written or may hereafter write for publication, including the right to license the publication of such material.

8. The offer of the Materials to which this agreement is applicable is conditioned upon the United States, acting by and through the Administrator of General Services, entering into an agreement with the University of Texas to utilize as a Presidential Archival Depository the space and facilities to be constructed, furnished, equipped and made available by it for such use without transfer of title, and upon agreement by the United States to maintain and operate the Library at all times thereafter as a Presidential Archival Depository for the preservation of such Materials, in accordance with the provisions of Section 507(f)(1) (44 U.S.C. 397(f)(1)) of the Federal Property and Administrative Services Act of 1949, as amended.

Sincerely,

/s/Lyndon B. Johnson

Honorable Lawson B. Knott, Jr.
Administrator of General Services
Washington, D.C.

Exhibit B

GENERAL SERVICES ADMINISTRATION
Washington 20405

Office of the Administrator

August 17, 1965

The President
The White House

Dear Mr. President:

It is an honor and pleasure on behalf of the United States to accept, in accordance with the powers vested in me by the Federal Property and Administrative Services Act of 1949, as amended, your generous offer of certain papers and other historical materials contained in your letter of August 13, 1965, under the conditions and restrictions which you have prescribed therein.

This priceless gift to the nation and scholars of this generation and those that follow will forever enrich our history and culture. I know that the memory of your selfless gesture will live eternally in the hearts of a grateful people.

Respectfully yours,

(Signed) Lawson B. Knott, Jr.
Lawson B. Knott, Jr.
Administrator

[Caption Omitted in Printing]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

JAMES E. ROCAP III, being duly sworn under oath, deposes and says as follows:

1. I am a law clerk presently employed at the law firm of Miller, Cassidy, Larroca & Lewin, 1320 19th Street, N.W., Washington, D.C. 20036.

2. On Wednesday, October 30, 1974, I spoke with Mr. Richard Jacobs of the Office of Presidential Libraries of the National Archives. I requested of Mr. Jacobs the information and statistics shown on the chart attached hereto as Exhibit A and made a part hereof.

3. Mr. Jacobs' secretary gave me the information shown in the last three columns over the telephone, stating that she had requested and received the information from persons at each of the Presidential Libraries shown on the attached chart. The first column of statistics is taken directly from another chart given me by Mr. Jacobs on October 29, 1974, entitled "Comparative Statistical Summary of Presidential Libraries—Fiscal Year Ending June 30, 1974," attached hereto as Exhibit B and made a part hereof.

4. I am informed and believe that the information shown on Exhibits A and B is true.

/s/James E. Rocap, III
James E. Rocap, III

Subscribed and sworn to
before me this 11th day
of November, 1974.

/s/Sandra M. Martin
Notary Public

My Commission Expires April 30, 1970 [SEAL]

COMPARATIVE STATISTICAL SUMMARY OF PRESIDENTIAL LIBRARIES
FISCAL YEAR ENDING JUNE 30, 1973

	HOOVER	ROOSEVELT	TRUMAN	EISENHOWER	KENNEDY	JOHNSON
Size of Building						
Gross sq. ft.	28,461	53,474	80,550	83,627[2]	–	150,000
Net Usable ft.	25,751	42,545	55,330	70,694[3]	9,000	103,000
Site						
Land Area (acres)	33[1]	16	13	13.4	10	14
Holdings						
Manuscript on Paper (pgs.)	4,855,878	21,303,633	9,912,400	16,802,492	15,539,370	31,956,369
Manuscript on Microfilm (pgs.)	–	913,834	–	84,300	2,511,200	6,435,101
Photographs	9,867	101,685	64,087	86,179	63,107	510,780
Motion Picture Film (ft.)	77,274	264,747	155,658	587,030	1,568,945	585,405
Sound Recordings (discs & tapes)	579	3,280	2,366	2,287	2,222	6,490
Oral History Transcripts (pgs.)	10,089	611	9,369	14,376	21,688	1,197
Museum Objects	2,753	20,598	11,583	17,247	11,224	34,423
Books	16,751	35,200	41,947	23,275	17,116	11,496
Other Printed Items	20,582	55,254	53,448	18,809	21,404	16,069

[continued]

COMPARATIVE STATISTICAL SUMMARY OF PRESIDENTIAL LIBRARIES
FISCAL YEAR ENDING JUNE 30, 1973

	HOOVER	ROOSEVELT	TRUMAN	EISENHOWER	KENNEDY	JOHNSON
Reference Services (FY 1973)						
Researcher Visits	609	1,345	767	342	461	434
Items Furnished	6,533	19,525	35,226	10,821	13,542	20,946
Reproductions Furnished	18,243	156,825	18,046	34,047	6,926	67,568
Museum Visitors (FY 1973)	82,870	194,194	340,818	299,741	–	694,180
Cost of Operation (FY 1973)						
Appropriated Funds (estimated)	$231,000	$319,000	$300,000	$371,000	$445,000	$577,000
Trust Fund (estimated)	$ 34,980	$ 94,985	$115,720	$117,590	$ 3,575	$ 73,260
Positions Authorized (full-time permanent)	19	29	23	39	26	38

[1]Hoover Park now administered by National Park Service.

[2]Library Building, 55,000; Museum Building, 28,677.

[3]Library Building, 44,784; Museum Building, 25,910.

Presidential Library	Total Document Holdings as of June 30, 1973	Approximate Volume of Holdings Which are Presidential Papers as of October 30, 1974	Approximate Volume of Presidential Papers Restricted by Donor as of October 30, 1974	Approximate Volume of Presidential Papers Restricted By Security Classification as of October 30, 1974
Hoover	4,855,878	2,250,000	34,000	None
Roosevelt	21,303,633	10,256,000	41,700	26,700
Truman	9,912,400	6,048,000	21,168[1]	60
Eisenhower	16,802,492	12,783,500	2,465,000	350,000
Kennedy	15,539,370	10,000,000	62,000[2]	350,000
Johnson	31,956,369	22,470,220	107,200[3]	1,000,000

[1]414,000 papers have not yet been screened and remain closed. They are not included in the Truman figures.
[2]500,000 papers have not yet been screened and remain closed.
[3]8,538,980 papers have not yet been screened and remain closed.

Source: Office of Presidential Libraries, National Archives

September 6, 1974

Honorable Arthur F. Sampson
Administrator
General Services Administration
Washington, D. C.

Dear Mr. Sampson:

In keeping with the tradition established by other former Presidents, it is my desire to donate the United States, at a future date, a substantial portion of my Presidential materials which are of historical value to our Country. In donating these Presidential materials to the United States, it will be my desire that they be made available, with appropriate restrictions, for research and study.

In the interim, so that my materials may be preserved, I offer to transfer to the Administrator of General Services (the "Administrator"), for deposit, pursuant to 44 U.S.C. Section 2101, *et seq.*, all of my Presidential historical materials as defined in 44 U.S.C. Section 2101 (hereinafter "Materials"), which are located within the metropolitan area of the District of Columbia, subject to the following:

1. The Administrator agrees to accept solely for the purpose of deposit the transfer of the Materials, and in so accepting the Materials agrees to abide by each of the terms and conditions contained herein.

2. In the event of my death prior to the expiration of the three-year time period established in paragraph 7A hereof, the terms and conditions contained herein shall be binding upon and inure to the benefit of the executor of my estate for the duration of said period.

3. I retain all legal and equitable title to the Materials, including all literary property rights.

4. The Materials shall, upon acceptance of this offer by the Administrator, be deposited temporarily in an existing facility belonging to the United States, located within the State of California near my present residence. The Materials shall remain deposited in the temporary California facility until such time as there may be established, with my approval, a permanent Presidential archival depository as provided for in 44 U.S.C. Section 2108.

5. The Administrator shall provide in such temporary depository and in any permanent Presidential archival depository reasonable office space for my personal use in accordance with 44 U.S.C. Section 2108(f). The Materials in their entirety shall be deposited within such office space in the manner described in paragraph 6 hereof.

6. Within both the temporary and any permanent Presidential archival depository, all of the Materials shall be placed within secure storage areas to which access can be gained only by use of two keys. One key, essential for access, shall be given to me alone as custodian of the Materials. The other key may be duplicated and entrusted by you to the Archivist of the United States or to members of his staff.

7. Access to the Materials within the secure areas, with the exception of recordings of conversations in the White House and the Executive Office Building which are governed by paragraphs 8 and 9 hereof, shall be as follows:

A. For a period of three years from the date of this instrument, I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B below and paragraph 10 herein. During said three-year period, I may make reproductions of any of the originals of the Materials and withdraw from deposit such reproductions for any use I may deem appropriate. Except as provided in subparagraph B below, access to the Materials shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. Any request for access to the Materials made to the Administrator, the Archivist of the United States or any member of their staffs shall be referred to me. After three years I shall have the right to withdraw from deposit without formality any or all of the Materials to which this paragraph applies and to retain such withdrawn Materials for any purpose or use I may deem appropriate, including but not limited to reproduction, examination, publication or display by myself or by anyone else I may approve.

B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privi-

lege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

8. The tape recordings of conversations in the White House and Executive Office Building which will be deposited pursuant to this instrument shall remain on deposit until September 1, 1979. I intend to and do hereby donate to the United States, such gift to be effective September 1, 1979, all of the tape recordings of conversations in the White House and Executive Office Building conditioned however on my continuing right of access as specified in paragraph 9 hereof and on the further condition that such tapes shall be destroyed at the time of my death or on September 1, 1984, whichever event shall first occur. Subsequent to September 1, 1979 the Administrator shall destroy such tapes as I may direct. I impose this restriction as other Presidents have before me to guard against the possibility of the tapes being used to injure, embarrass, or harass any person and properly to safeguard the interests of the United States.

9. Access to recordings of conversations in the White House and Executive Office Building within the secure areas shall be restricted as follows:

   A. I agree not to withdraw from deposit any originals of the Materials, except as provided in subparagraph B and paragraph 10 below, and no reproductions shall be made unless there is mutual agreement. Access to the tapes

shall be limited to myself, and to such persons as I may authorize from time to time in writing, the scope of such access to be set forth by me in each said written authorization. No person may listen to such tapes without my written prior approval. I reserve to myself such literary use of the information on the tapes.

   B. In the event that production of the Materials or any portion thereof is demanded by a subpoena or other order directed to any official or employee of the United States, the recipient of the subpoena or order shall immediately notify me so that I may respond thereto, as the owner and custodian of the Materials, with sole right and power of access thereto and, if appropriate, assert any privilege or defense I may have. Prior to any such production, I shall inform the United States so it may inspect the subpoenaed materials and determine whether to object to its production on grounds of national security or any other privilege.

10. The Administrator shall arrange and be responsible for the reasonable protection of the Materials from loss, destruction or access by unauthorized persons, and may upon receipt of an appropriate written authorization from the Counsel to the President provide for a temporary re-deposit of certain of the Materials to a location other than the existing facility described in paragraph 4 herein, provided however that no dimunition of the Administrator's responsibility to protect and secure the Materials from loss, destruction,

unauthorized copying or access by unauthorized persons is affected by said temporary re-deposit.

11. From time to time as I deem appropriate, I intend to donate to the United States certain portions of the Materials deposited with the Administrator pursuant to this agreement, such donations to be accompanied by appropriate restrictions as authorized by 44 U.S.C. Section 2107. However, prior to such donation, it will be necessary to review the Materials to determine which of them should be subject to restriction, and the nature of the restrictions to be imposed. This review will require a meticulous, thorough, time-consuming analysis. If necessary to fulfill this task, I will request that you designate certain members of the Archivist's staff to assist in this review under my direction.

If you determine that the terms and conditions set forth above are acceptable for the purpose of governing the establishment and maintenance of a depository of the Materials pursuant to 44 U.S.C. Section 2101 and for accepting the irrevocable gift of recordings of conversations after the specified five-year period for purposes as contained in paragraph 8 herein, please indicate your acceptance by signing the enclosed copy of this letter and returning it to me. Upon your acceptance we both shall be bound by the terms of this agreement.

Sincerely,
/s/ Richard M. Nixon

Accepted by: Arthur F. Sampson
Administrator
General Services Administration

[Copy Omitted in Printing]

ANSWER

Defendants, by their undersigned attorneys, in answer to the Complaint, herein admit, deny, and allege as follows:

1. The statements contained in paragraph 1 of the Complaint are legal conclusions not requiring answer.

2. The statements contained in the first sentence of paragraph 2 of the Complaint are legal conclusions not requiring answer. For lack of knowledge or information sufficient to form a belief, defendants deny the remaining allegations contained in paragraph 2, except that they admit that the Administrator is found in the District of Columbia.

3-5, inclusive. Defendants admit the allegations contained in paragraphs 3-5, inclusive.

6. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 6 of the Complaint, except that they admit that materials presently located within the White House complex, including the Executive Office Building, include correspondence and other items deriving from the period of time represented by the Presidency of Richard Nixon and that despite requests, said materials have not been sent to Mr. Nixon.

7. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 7 of the Complaint, except that they admit that materials located within the White House complex, requested by Mr. Nixon, have not been sent to him.

8. Defendants admit the allegations contained in paragraph 8 of the Complaint.

9. The statements contained in paragraph 9 of the Complaint are legal conclusions not requiring answer but, to the extent they may be deemed allegations of fact, they are denied for lack of knowledge or information sufficient to form a belief.

10. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 10 of the Complaint.

11. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 11 of the Complaint, except that they admit that materials generated within the White House and the Executive Office of the President, during Mr. Nixon's Presidency, reflect communications between himself and his aides relating to the conduct of the Office of the President. The remaining statements contained in paragraph 11 are not allegations of fact but are legal conclusions not requiring answer.

12. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in the first sentence of paragraph 12. The statement contained in the second sentence of paragraph 12 is not an allegation of fact requiring answer.

13. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 13 of the Complaint.

14. Defendants deny the allegations contained in the first sentence of paragraph 14 and admit the allegations contained in the second sentence of paragraph 14.

15. Defendants deny the allegations contained in paragraph 15 of the Complaint, except that they admit that on or about September 3, 1974, Philip W. Buchen, counsel to the President, and others entered into discussions with a representative of plaintiff concerning

the deposit and safekeeping of materials created and generated during the Presidency of Richard Nixon. Defendants further aver that said discussions culminated in an agreement between Richard Nixon and Arthur Sampson dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

16. Defendants deny the allegations contained in paragraph 16 of the Complaint, except they admit that on or about September 3, 1974, representatives of plaintiff were advised by Philip Buchen, or his representatives, that the Attorney General of the United States had been requested to provide an opinion with respect to the ownership of materials created and generated during the Presidency of Richard Nixon. Defendants further aver that on September 6, 1974, an opinion of the Attorney General on the subject was delivered, and the Court is respectfully referred to the opinion for its contents.

17. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 17.

18. Defendants deny the allegations contained in paragraph 18 of the Complaint, except they admit that an agreement was entered into by plaintiff and defendant Administrator dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

19-23, inclusive. Defendants deny the allegations contained in paragraphs 19-23, inclusive, except that they admit that an agreement was entered into between plaintiff and defendant Administrator dated September 6, 1974, and the Court is respectfully referred to that agreement for its terms and conditions.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint, except they admit that on or about September 12, 1974, members of the Watergate Special Prosecution Force met with Philip Buchen and members of his staff and that materials created and generated during the Presidency of Mr. Nixon were not transferred to California.

25. Defendants deny the allegations contained in paragraph 25 of the Complaint, except that they admit that for several weeks prior to October 17, 1974, representatives of plaintiff participated in discussions and negotiations with members of the Watergate Special Prosecution Force and that representatives of the Watergate Special Prosecutor indicated an intention to serve a subpoena duces tecum on Mr. Buchen with respect to materials created and generated during the Presidency of Richard Nixon.

26. Defendants deny the allegations contained in paragraph 26 of the Complaint, except that they admit that Richard Nixon requested that steps be taken to implement the agreement of September 6, 1974.

27. Defendants deny the allegations contained in paragraph 27 of the Complaint, except they admit that subsequent demands for implementation of the depository agreement were made to Philip Buchen and others.

28. In answer to the allegations contained in paragraph 28 of the Complaint, defendants admit the filing of the actions referred to therein and respectfully refer the Court to such actions for a recitation of the issues involved therein.

29. For lack of knowledge or information sufficient to form a belief, defendants deny the allegations contained in paragraph 29 of the Complaint.

30. Defendants deny the allegations contained in paragraph 30 of the Complaint, except they admit that pursuant to a civil subpoena demand and order of the District Court in *Dellums, et al. v. Powell, et al.*, Civil Action No. 71-2271 (D.D.C.), Philip Buchen or his agents conducted a search of certain tape recordings created during the Presidency of Richard Nixon and that Philip Buchen is in receipt of a civil subpoena in *Halperin, et al. v. Kissinger, et al.*, Civil Action No. 73-1187 (D.D.C.), and the Court is respectfully referred to said subpoena for its terms and conditions.

31. Defendants deny the allegations contained in paragraph 31 of the Complaint, except they admit that the Special Prosecutor served a series of eight (8) subpoenas duces tecum on Philip Buchen, and the Court is respectfully referred to said subpoenas for their terms and conditions; that said subpoenas were thereafter withdrawn, and that on November 9, 1974, an agreement was entered into between defendant Administrator, Philip Buchen, H. Stuart Knight, and the Watergate Special Prosecutor, and the Court is respectfully referred to said November 9th agreement for its terms and conditions.

32. Defendants deny the allegations contained in paragraph 32 of the Complaint, except they admit that on November 11, 1974, plaintiff sought a temporary restraining order in Civil Action No. 74-1518 and that a joint motion of defendants and the Special Prosecutor for modification of the temporary restraining order previously issued in Civil Action No. 74-1518 has been filed and is pending before that Court.

33. Defendants deny the allegations contained in paragraph 33 of the Complaint, except they admit that a bill (S. 4016) was introduced in the U. S. Senate on

September 18, 1974, by Senators Nelson, Ervin, Javits, Ribicoff, Metcalf, Huddleston, Chiles, Percy, Muskie, Hatfield, Dole, Montoya, and Stevenson, and the Court is respectfully referred to the language of S. 4016 for its provisions.

34. Defendants deny the allegations contained in paragraph 34 of the Complaint, except they admit Senators Ervin and Montoya served as Chairman and member, respectively, of the Ervin Committee which litigated with plaintiff Nixon, and the Court is respectfully referred to the opinion of the Court of Appeals for its ruling and the nature of the controversy.

35. Defendants deny the allegations contained in paragraph 35 of the Complaint, except they admit that S. 4016 was referred to the Senate Committee on Government Operations which reported it to the Senate without prior hearing and that the Senate passed S. 4016 on October 4, 1974.

36. Defendants deny the allegations contained in paragraph 36 of the Complaint, except they admit that S. 4016 was sent to the Committee on House Administration on October 7, 1974, which reported S. 4016 to the House of Representatives on November 27, 1974, that said Committee considered matters pertaining to the subject matter of S. 4016 and that the House of Representatives passed S. 4016, as amended, on December 3, 1974.

37. Defendants deny the allegations contained in paragraph 37 of the Complaint, except they admit that the House Judiciary Committee subpoenaed certain materials in connection with the impeachment proceedings against then President Nixon.

38. Defendants deny the allegations contained in paragraph 38 of the Complaint, except they admit that

members of the House of Representatives at the time S. 4016 passed the House were parties to civil litigation in which access was sought to documents and materials generated and created during the Presidency of Richard M. Nixon.

39. Defendants admit the allegations contained in paragraph 39 of the Complaint.

40-50, inclusive. Defendants deny the allegations contained in paragraphs 40-50, inclusive, of the Complaint and respectfully refer the Court to the provisions of Public Law 93-526 for its terms and conditions.

51-64, inclusive. Defendants deny the allegations contained in paragraphs 51-64, inclusive, of the Complaint.

Defendants deny each and every allegation of the Complaint not hereinabove specifically admitted, qualified or denied.

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

The Court lacks jurisdiction over the subject matter of this action to the extent that certain of the claims set forth in the Complaint cannot be adjudicated until after the promulgation of regulations called for by Public Law 93-526.

Third Defense

The Court lacks jurisdiction over the subject matter of this action.

WHEREFORE, defendants pray that the action be dismissed with costs and that the Court grant such further relief as may seem just and proper

Respectfully submitted,

/s/Carla A. Hills
CARLA A. HILLS
Assistant Attorney General

/s/Earl J. Silbert
EARLE J. SILBERT
United States Attorney

/s/Irving Jaffe
IRVING JAFFE
Deputy Assistant Attorney General

/s/Irwin Goldbloom
IRWIN GOLDBLOOM
Deputy Assistant Attorney General

/s/Bernard J. Carl
BERNARD J. CARL
Special Assistant to the
Assistant Attorney General

/s/Jeffrey Axelrad
JEFFREY AXELRAD
Attorney, Department of Justice

Attorneys, Department of Justice
Washington, D.C. 20530
Telephone: 202-739-3300
Attorneys for Defendants

[Caption Omitted in Printing]

ORDER

The Court, having received with respect to two preliminary questions the submissions of the parties and the *amici* by means of brief and oral argument, has concluded as follows:

1. The Court has, as required by law, been properly convened for the purpose of entertaining and disposing of the pending claim by the plaintiff for injunctive relief against the enforcement, operation or execution of the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1965 (1974), for repugnance to the Constitution of the United States. The Court finds that there is nothing in the statute, and particularly in Section 105(a) thereof, or in the meagre legislative history underlying it, negating the continuing necessity that claims of this nature be decided by a three-judge-court convened and constituted under the provisions of 28 U.S.C. 2282, 2284.

2. The Court is not disposed at this time to request the United States Court of Appeals to dissolve the stay issued by it in the so-called consolidated cases presently pending before a single judge of the District Court. (C.A. Nos. 74-1518, 74-1533 and 74-1551.) The Court is of the view in this connection, that the central purpose of Congress in relation to all pending litigation is to have an early—and prior—determination of the Act's constitutionality; and that in the peculiar circumstances of this case that purpose is best served by this Court proceeding to decide that question before the entry of any judgment in the consolidated cases.

3. This Court shall hear and determine the sole issue of the propriety of injunctive relief against the

enforcement of the Presidential Recordings and Materials Preservation Act. P.L. 93-526, on the grounds of its unconstitutionality.

4. It appears to the Court that there is no necessity for separate consideration of the pending request for preliminary relief.

In light of these conclusions, and for the purposes of proceeding in as orderly and efficient a manner as possible, it is hereby ORDERED that:

1. The pending motions for intervention filed by the Special Prosecutor, Reporters Committee, et al., Lillian Hellman, et al., and Jack Anderson are granted, except that (a) such intervention shall be for the limited purpose of being heard on the single issue of the claim for injunctive relief, and (b) in view of the essentially common interests of the three last-named movants with respect to that claim, their intervention shall be as defendants and on a joint basis.

2. A pre-hearing conference is hereby scheduled on the 29th day of May, 1975, at 2 o'clock p.m. in the Chambers of Judge Aubrey E. Robinson, Jr.

3. The parties, including intervenors, shall submit to the Court within fifteen (15) days from the date hereof, memoranda of their views on the following:

a) Procedural matters requiring pre-hearing consideration.

b) Evidentiary matters requiring pre-hearing consideration

c) Proposed briefing schedule and suggested hearing date.

d) Such other matters as may be appropriate for an orderly and prompt determination of the issue in this case.

/s/Carl McGowan
CARL McGOWAN
UNITED STATES CIRCUIT JUDGE

/s/Edward A. Tamm
EDWARD A. TAMM
UNITED STATES CIRCUIT JUDGE

/s/Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

DATE: May 1, 1975

[Caption Omitted in Printing]

COMPLAINT BY INTERVENOR-PLAINTIFF FOR INJUNCTION, DECLARATORY JUDGMENT AND OTHER RELIEF

1. This is an action brought by Richard M. Nixon, former President of the United States, challenging the validity of an Act of Congress, the Presidential Recordings and Materials Preservation Act of 1974 (the 1974 Act) and seeking enforcement of a purported contract between him and defendant Arthur F. Sampson, Administrator of General Services, providing for the delivery to Mr. Nixon of certain documents and tape recordings (the records). Intervenor-plaintiff Jack Anderson (intervenor) seeks a declaratory judgment that the records were when they were created and are still United States government records subject to the Freedom of Information Act, 5 U.S.C. §552, which thereunder intervenor is entitled to examine and copy, and that nothing in the 1974 Act

reduces or limits intervenor's rights under the Freedom of Information Act; and further seeks a permanent injunction against defendants' continued withholding of the records in violation of the Freedom of Information Act.

Jurisdiction

2. The Court has jurisdiction of this action under §105 of the 1974 Act and of intervenor's claim pursuant to 5 U.S.C. §552(a)(3) and 28 U.S.C. §1331. The amount in controversy exceeds $10,000, exclusive of interest and costs.

Parties

3. Plaintiff Richard M. Nixon was President of the United States from January 20, 1969, to August 9, 1974.

4. Intervenor-plaintiff Jack Anderson is a reporter, newspaper columnist and radio commentator with 75 million readers and 100,000 listeners.

5. Defendant Administrator of General Services is designated by the 1974 Act as the official who is to have custody of the records and make them available to the public pursuant to regulation. The Administrator does or will pursuant to the Act have possession, custody and control of the records described in ¶6.

Facts

6. Between January 20, 1969, and August 9, 1974, plaintiff Nixon and other officials and employees of the Executive Office of the President of the United States and other officials and employees of the Executive branch of the government of the United States created and accumulated within the White House, the Executive Office Buildings and elsewhere, records, in the form of documents and tape recordings, of their activities

performed pursuant to and in the course of carrying out the duties and functions of their offices.

7. The records described in ¶6 presently are located within the District of Columbia under the custody and control of defendant Administrator.

8. On September 7, 1974, plaintiff Nixon transmitted and defendant Sampson accepted a letter purporting to recognize that the records are the personal property of plaintiff Nixon and purporting to accept the records for deposit by defendant Sampson under certain conditions, including the physical transfer of the records to a place near plaintiff Nixon's present residence in San Clemente, California.

9. On September 10, 1974, intervenor filed with defendant's agency, General Services Administration (GSA), a request under the Freedom of Information Act, 5 U.S.C. §552, and applicable G.S.A. regulations, for access to the records for the purpose of inspection and copying, and requesting that pending consideration of the request the records not be removed from their present location and custody.

10. On October 3, 1974, G.S.A. denied the request.

11. On October 8, 1974, intervenor appealed the denial. Intervenor is informed and believes that the appeal will likewise be denied and that to await formal action on the appeal would be futile. Intervenor has exhausted his administrative remedies.

12. On December 19, 1974, the President signed the 1974 Act into law. Under the Act defendant Administrator is to obtain possession of the records and is to issue regulations providing for public access to the records. The Act expressly provides that the access to be provided shall be no less than the access already provided by the Freedom of Information Act, 5 U.S.C. §552. Defendant

Administrator has asserted, nevertheless, through counsel that he may by regulation prevent access, and create new exemptions and limitations to access not provided in the Freedom of Information Act.

13. On December 20, 1974, plaintiff Nixon filed this action in this Court, challenging the validity, as repugnant to the Constitution, of the 1974 Act and seeking, in the alternative, either enforcement of the purported agreement of September 7, 1974, including the transfer of the records to a location near San Clemente, California, or the unconditional delivery of the records to him. If plaintiff Nixon obtains such relief, intervenor would be irrevocably injured and deprived forever of rights secured to him under the Freedom of Information Act, 5 U.S.C. §552.

Claim for Relief Against Defendants

14. Defendant Administrator may not, by regulation or otherwise, reduce or limit intervenor's access to the records by creating exemptions not provided in, or otherwise in derogation of, the Freedom of Information Act, 5 U.S.C. §552.

15. Defendant Administrator is forbidden by law, to wit, 44 U.S.C. §§2101-14, 2901-3314, and the 1974 Act to deliver the records to Richard M. Nixon or any other private individual, either pursuant to the September 7, 1974, agreement or otherwise; the records were not and are not the private personal property of Richard M. Nixon but at all times were and are records of the government of the United States of America.

16. The records are records within the meaning of the Freedom of Information Act, to which intervenor is entitled to access thereunder, the burden of proof to the contrary being upon defendant Administrator, who is

under a duty to preserve the records and provide intervenor access to them as provided in the Freedom of Information Act.

Cross-claim

17. Plaintiff Nixon's claim to ownership, possession and custody of the records is inconsistent with and if allowed would necessarily defeat intervenor's claim for access to the records as government records; an actual controversy exists between intervenor and plaintiff Nixon.

Relief Requested

Intervenor requests that this Court

18. Declare that the records are records within the meaning of the Freedom of Information Act.

19. Declare that intervenor is entitled to access to the records under the Freedom of Information Act.

20. Declare that the purported agreement between plaintiff Nixon and defendant Sampson of September 7, 1974, is unenforceable, null and void.

21. Declare that the 1974 Act preserves and does not reduce or limit intervenor's rights and the rights of all persons to access to the records provided in the Freedom of Information Act, 5 U.S.C. §552, as amended; and that the 1974 Act does not confer upon the Administrator authority, by regulation, to create new exemptions to disclosure not otherwise contained in the Freedom of Information Act.

22. Enjoin defendant Administrator from attempting or purporting by regulation or otherwise, to limit or reduce intervenor's access to the records by creating or purporting to create restrictions upon access or exemp-

tions from disclosure not otherwise provided or contained in the Freedom of Information Act.

/s/William A. Dobrovir
/s/signed by Joseph D. Gebhardt
WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036
(202) 785-8919

Attorneys for Intervenor-Plaintiff

[Caption Omitted in Printing]

ANSWER AND COUNTERCLAIM OF
HENRY S. RUTH, JR., SPECIAL PROSECUTOR

Intervenor-defendant Henry S. Ruth, Jr., Special Prosecutor, stating as and for his answer to the numbered paragraphs of the complaint:

1. Admits that this is a suit for injunctive and declaratory relief, but otherwise denies the allegations and conclusions of law contained in the description of the suit in paragraph 1.

2. Denies the allegations and conclusions of law of paragraph 2, but admits that many of the acts alleged in the complaint occurred in the District of Columbia.

3. - 5. Admits the allegations of paragraphs 3, 4, and 5.

6. - 7. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 6 and 7.

8. Admits that plaintiff and other officials and employees of the federal government generated a substantial number of documents, papers, tapes, photographs, notes and other items during the period plaintiff served as President, and that many of these materials were retained within the White House or other government buildings, but alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 8.

9. Denies the allegations and conclusions of law of paragraph 9.

10. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10.

11. Admits that many of the materials referred to in paragraph 11 relate to the conduct of the Office of the President and that communications between a President and his aides relating to the conduct of the Office of the President are presumptively privileged from disclosure to persons outside of the Executive Branch, but denies that a former President may invoke the privilege to prevent access to or use of the materials by the Executive Branch in connection with ongoing government business; further denies that the presumptive privilege only may be overcome upon demonstration of a specific need for relevant evidence in a criminal prosecution; and states that the opinion of the Supreme Court in *United States v. Nixon* speaks for itself, but denies that the opinion holds that a former President may invoke executive or presidential privilege.

12. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13.

14. Admits that Philip W. Buchen, Counsel to President Gerald R. Ford and custodian of the materials created and generated during the Presidency of Mr. Nixon (the "presidential materials"), after discussions with members of the Special Prosecutor's office, agreed not to allow any of the "presidential materials" to be transferred from their present location in the White House and other government buildings, but alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the other allegations of paragraph 14.

15. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15.

16. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16, but admits that the Attorney General issued an opinion on September 6, 1974, which recognized a property interest of a former President in the materials of his Administration subject to the needs of the incumbent Administration for ongoing government business.

17. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. Admits that plaintiff and defendant Administrator entered into a letter agreement on September 7, 1974, but denies the other allegations and conclusions of law of paragraph 18.

19. - 23. Denies the conclusions of law of paragraphs 19 through 23, and states that the words of the agreement speak for themselves.

24. Admits that on September 12, 1974, Philip W. Buchen, after discussions with members of the Special Prosecutor's office, stated that he would not allow any of the "presidential materials" to be transferred from their present location in the White House and other government buildings pending discussions among representatives of plaintiff Nixon, the Special Prosecutor, and President Ford concerning access to and use by the Special Prosecutor of those "presidential materials" needed for the Special Prosecutor's ongoing investigations and prosecutions, but denies that this determination was first made on September 12, 1974, in that J. Fred Buzhardt, Counsel to former President Nixon, and Mr. Buchen made a similar determination on August 15, 1974, which was communicated to members of the Special Prosecutor's office, and denies the other allegations and conclusions of law of paragraph 24.

25. Admits that members of the Special Prosecutor's office negotiated with representatives of plaintiff concerning access to and use by the Special Prosecutor of those "presidential materials" which were needed for ongoing investigations and prosecutions, that the negotiations did not lead to any agreement, and that members of the Special Prosecutor's office stated their intention to serve a subpoena *duces tecum* on Mr. Buchen for certain of the "presidential materials," but denies the other allegations of paragraph 25.

26. - 27. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 26 and 27.

28. Admits the allegations of paragraph 28 that plaintiff filed a civil action against defendant Administrator, Mr. Buchen, and H. Stuart Knight on October 17, 1974 and that two other lawsuits concerning the

"presidential materials" were subsequently filed and consolidated with the action begun by plaintiff, and respectfully refers the Court to such actions for the determination of the parties and issues involved therein.

29. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 29.

30. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 30, but denies that any search conducted by Mr. Buchen pursuant to subpoena would violate any constitutional or other lawful rights or privileges of plaintiff.

31. Admits that the Special Prosecutor served eight subpoenas *duces tecum* on Mr. Buchen subsequent to October 17, 1974, that such subpoenas were withdrawn on November 9, 1974, and that defendant Administrator, Messrs. Buchen and Knight, and the Special Prosecutor entered into an Agreement on November 9, 1974, but denies the other allegations of paragraph 31 and states that the words of the Agreement speak for themselves.

32. Denies the allegations of paragraph 32, except insofar as they state that on November 11, 1974, plaintiff sought an order restraining implementation of the November 9 Agreement and the Special Prosecutor and defendants Sampson, Buchen and Knight sought an order allowing implementation of that Agreement, and that to date no order permitting implementation has been entered.

33. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 33.

34. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the

allegations of paragraph 34, but admits that Senators Ervin and Montoya had been members of the Senate Select Committee on Presidential Campaign Activities of the 93d Congress, 2d Session, and that that Committee had issued a subpoena *duces tecum* to then-President Nixon which was the subject of litigation. The Court is respectfully referred to the opinion of the Court of Appeals for its ruling.

35. - 39. Alleges that he lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 35 thru 39, but admits that President Ford signed S. 4016, the Presidential Recordings and Materials Preservation Act, Public Law 93-526, on December 19, 1974, and that various Members of the House of Representatives who voted for that bill had earlier taken part in impeachment proceedings against then-President Nixon.

40. - 50. Denies the allegations and conclusions of law of paragraphs 40 thru 50, but states that the words of the Presidential Recordings and Materials Preservation Act speak for themselves.

51. - 61. Denies the allegations and conclusions of law of paragraphs 51 thru 61.

62. - 64. Denies the allegations and conclusions of law of paragraphs 62 thru 64.

The Special Prosecutor denies each and every allegation of the Complaint not hereinabove specifically admitted, qualified or denied.

FIRST DEFENSE

65. The Court lacks jurisdiction over the subject matter of this action insofar as it seeks an injunction or mandamus because of sovereign immunity.

SECOND DEFENSE

66. The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

67. The letter agreement of September 7, 1974, between plaintiff and defendant Administrator is void and unenforceable because of Public Law 93-526, the Presidential Recordings and Materials Preservation Act.

FOURTH DEFENSE

68. The letter agreement of September 7, 1974, between plaintiff and defendant Administrator is void and unenforceable because it was entered into in violation of 44 U.S.C. § § 2107 and 2108.

FIFTH DEFENSE

69. Plaintiff may not be granted equitable relief or mandamus to enforce the September 7, 1974, letter agreement between plaintiff and defendant Administrator because implementation of the terms of that agreement is a matter committed to the discretion of the United States and its officers.

SIXTH DEFENSE

70. The September 7, 1974, letter agreement between plaintiff and defendant Administrator does not bar access to the "presidential materials" by the incumbent Administration prior to their temporary deposit "in an existing facility belonging to the United States, located within the State of California."

SEVENTH DEFENSE

71. Plaintiff Nixon lacks standing to assert executive privilege or other official privilege which attends to the Office of President of the United States to prevent access to or use by the incumbent President or his designee within the Executive Branch of any of the "presidential materials"which are needed for the ongoing business of the government.

EIGHTH DEFENSE

72. The President of the United States or his designee within the Executive Branch has an overriding right under Article II of the Constitution of the United States to access to and use of those official materials of prior Administrations which the incumbent President determines are necessary and important to the ongoing business of the government.

NINTH DEFENSE

73. The September 7, 1974, letter agreement between plaintiff and defendant Administrator does not affect, limit or cede the overriding right of the incumbent Administration to access to and use of those official materials of the Nixon Administration which the incumbent President determines are necessary and important to ongoing business of the government.

TENTH DEFENSE

74. Access to and use of the official materials of the Nixon Administration by the incumbent Administration for ongoing business of the government will not impair any constitutional or other lawful rights or privileges of plaintiff Nixon.

ELEVENTH DEFENSE

75. The Agreement of November 9, 1974, between the Special Prosecutor and Arthur F. Sampson, Philip W. Buchen and H. Stuart Knight, which affords the Special Prosecutor access to and use of those "presidential materials" that are relevant and important to investigations and prosecutions within the jurisdiction of the Special Prosecutor, is valid and enforceable.

COUNTERCLAIM

76. Jurisdiction for this counterclaim is founded on 28 U.S.C. §1345, as hereinafter more fully appears.

77. Henry S. Ruth, Jr. was appointed Special Prosecutor on October 26, 1974, by the Attorney General .

78. Under regulations promulgated by the Attorney General, the Special Prosecutor is authorized, pursuant to 28 U.S.C. §515(a), to conduct any kind of legal proceeding, civil or criminal, which United States attorneys are authorized by law to conduct and to designate attorneys to conduct such legal proceedings. See 28 C.F.R. §0.38(a). United States attorneys are authorized by 28 U.S.C. §547(2) to prosecute or defend, for the Government, civil actions, suits or proceedings in which the United States is concerned.

79. Under regulations promulgated by the Attorney General, the Special Prosecutor has "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White

House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General."

80. Upon information and belief, some of the "presidential materials" now in the possession, custody and control of the United States are relevant and important to current investigations and prosecutions within the jurisdiction of the Special Prosecutor.

81. On or about November 8, 1974, President Gerald R. Ford personally determined and informed his counsel that "the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of those presidential materials of the Nixon Administration now located in the White House complex that are relevant and important to ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction."

82. Pursuant to this determination by the President, and based upon the constitutional right and power of the Executive described in paragraph 72 above, defendant Administrator, Messrs. Buchen and Knight, and the Special Prosecutor entered into an Agreement (the "Agreement") on November 9, 1974, to afford the Special Prosecutor access to and use of those "presidential materials" that are relevant and important to the Special Prosecutor's investigations and prosecutions. (A copy of the Agreement is attached hereto as Exhibit A.)

83. The "presidential materials" to which President Ford has given the Special Prosecutor limited access and use were the official records of the United States during plaintiff's tenure as President. The November 9, 1974 Agreement does not provide for the search of any materials that relate to purely personal matters of plaintiff. It covers only those materials that relate to the conduct of public matters.

84. The Agreement establishes procedures to minimize access to irrelevant materials by limiting searches to those files and recorded conversations that may contain items actually relevant to the Special Prosecutor's jurisdiction. Before being granted access, the Special Prosecutor must specify in writing "those materials that he has reason to believe are relevant to specified criminal investigations or prosecutions within the Special Prosecutor's jurisdiction and * * * why access to such materials is important to a full and fair resolution of those investigations and prosecutions."

85. The agreement provides that before any search for specified materials is conducted pursuant to the Agreement, plaintiff or his attorney or designated agent must be given notice of the search.

86. All of the "presidential materials" to which access and use is accorded the Special Prosecutor by the Agreement are in the possession, custody and control of the United States.

87. Paragraphs 67-68 and 70-74 are realleged and incorporated by reference herein. Implementation of the Agreement will not violate the Presidential Recordings and Materials Preservation Act, the September 7, 1974 letter agreement between plaintiff and defendant Administrator, or any constitutional or other lawful rights or privileges of plaintiff.

88. Implementation of the Agreement, which would provide the Special Prosecutor access to and use of those "presidential materials" relevant and important to investigations and prosecutions within his jurisdiction, is essential to the public interest.

89. Plaintiff Nixon, by his complaint, seeks injunctive relief that would bar implementation of the Agreement.

WHEREFORE Henry S. Ruth, Jr., Special Prosecutor, respectfully requests:

(1) that the complaint of plaintiff Richard M. Nixon be dismissed;

(2) that, in the alternative, any equitable relief granted plaintiff specifically allow implementation of the November 9, 1974 Agreement;

(3) that the November 9, 1974 Agreement be declared valid and enforceable; and

(4) such other and further relief as the Court deems appropriate.

Respectfully submitted,
/s/Henry S. Ruth, Jr.
HENRY S. RUTH, JR.
Special Prosecutor

/s/Peter M. Kreindler
PETER M. KREINDLER
Counsel to the Special Prosecutor

/s/Richard J. Davis
RICHARD J. DAVIS
Assistant Special Prosecutor

/s/Kenneth S. Geller
KENNETH G. GELLER
Assistant Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N.W.
Washington, D.C. 20005

Dated: January 9, 1975

NOVEMBER 9, 1974 AGREEMENT

WHEREAS, Gerald R. Ford, President of the United States has determined and informed his Counsel that the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of those Presidential materials of the Nixon Administration now located in the White House complex that are relevant and important to ongoing criminal investigations and prosecutions within the Special Prosecutor's jurisdiction; and

WHEREAS, this Agreement, if implemented, would accommodate the needs of the Special Prosecutor with respect to such materials;

NOW, THEREFORE, the undersigned have agreed as follows:

1. Upon letters from the Special Prosecutor to Counsel to the President specifying those materials that he has reason to believe are relevant to specified criminal investigations or prosecutions within the Special Prosecutor's jurisdiction and explaining why access to such materials is important to a full and fair resolution of those investigations and prosecutions, the Special Prosecutor or his designees shall be afforded access to the materials under the following procedures:

a. *Documents*

1. Where files are organized by subject matter, only those files may be examined which, because of their titles, may contain documents relevant to these specified investigations and prosecutions.

2. Where files are organized chronologically, only that portion of the file covering the time period relevant to the request may be examined.

3. Where no chronological or subject label is on a file, the file may be examined to determine whether the file contains relevant materials.

4. In order to assist in these searches, the Special Prosecutor may request the assistance of members of the archival staff assigned to the White House in making a list of file titles or other index.

b. *Tape Recordings:* Only the tape recordings of conversations specified by letters according to the above procedures may be listened to.

2. The Special Prosecutor shall be allowed to make copies of only those tapes of conversations and documents that he determines are relevant to criminal investigations or prosecutions within his jurisdiction. Prior to the Special Prosecutor receiving such copies, Counsel to the President may review the copies to determine whether they may not be disclosed for reasons of national security. The originals of any tapes and documents, copies of which are provided to the Special Prosecutor, shall be retained and, if necessary for a criminal proceeding, will be given to the Special Prosecutor for such proceeding in exchange for the copies.

3. Richard M. Nixon or his attorney or designated agent shall be given notice of, and may be present during, searches pursuant to this Agreement. Also, Mr. Nixon or his attorney or designated agent, shall be afforded access to and/or copies of those tapes of conversation and documents for which the Special Prosecutor is allowed copies. The Counsel to the President also may designate individuals to be present during these searches.

4. No Presidential materials shall be removed to locations in Washington, D.C. other than the White House complex without the approval of the Special Prosecutor and no portions of such materials shall be removed to

locations outside of the District of Columbia without an indication from the Special Prosecutor that he has no further need for such portions, except upon court order.

5. The parties to this Agreement shall move jointly to modify, if necessary, the temporary restraining order as now outstanding in Civil Action number 74-1518 and in consolidated cases in the United States District Court for the District of Columbia to permit implementation of this Agreement.

/s/Philip W. Buchen Nov 8, 1974
Philip W. Buchen
Counsel to the President

/s/Arthur F. Sampson 11/9/74
Arthur F. Sampson
Administrator of General Services

/s/H. Stuart Knight 11/9/74
H. Stuart Knight
Director, United States Secret Service

/s/Henry S. Ruth, Jr. Nov. 8, 1974
Henry S. Ruth, Jr.
Special Prosecutor
Watergate Special Prosecution Force

[Caption Omitted in Printing]

ANSWER OF INTERVENOR-DEFENDANTS THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, ET AL.

Intervenor-Defendants The Reporters Committee for Freedom of the Press, et al. (hereafter "Intervenor-Defendants") answer the Complaint of Plaintiff Richard M. Nixon (hereafter "Plaintiff") as set forth below.

PRELIMINARY STATEMENT

Intervenor-Defendants find it necessary to note, at the outset, that many of the allegations of fact set forth in the Complaint contain and are inextricably mixed with characterizations and legal assumptions to such an extent that single factual admissions or denials, of the sort normally possible in federal court pleading, are impossible. The following paragraphs of this Answer attempt to distinguish between factual allegations and characterizations to the extent feasible, and to admit to factual assertions that are not contested insofar as they can be separated from such characterizations.

FIRST DEFENSE

Intervenor-Defendants answer the numbered paragraphs of the Complaint as follows:

1. Intervenor-Defendants admit the allegations of Paragraph 1, except that they deny the allegations, characterizations and conclusions of law contained concerning the Act of Congress referred to therein and its effect on Mr. Nixon's rights.

2. Intervenor-Defendants admit that this Court has jurisdiction to hear this action under 28 U.S.C. § § 1331, 1332 and 1361, but deny that jurisdiction is properly based on 28 U.S.C. § § 1346, 3456 and 2282. Intervenor-Defendants admit that Defendant-Administrator is found in the District of Columbia and that the amount in controversy exceeds the sum or value of $10,000. Intervenor-Defendants further admit that many of the acts relating to the subject matter of this action occurred in the District of Columbia.

3-5. Intervenor-Defendants admit the allegations of Paragraph 3 through 5.

6. Although Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6, it seems likely to Intervenor-Defendants that Plaintiff maintained some personal materials at the White House during his term as President. Intervenor-Defendants are without knowledge sufficient to form a belief as to the truth of the allegations (a) that some of these materials are still located in the White House complex, (b) that Mr. Nixon has made requests for such materials, or (c) that such materials have not been sent to Mr. Nixon.

7. Although Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 7, it seems likely to Intervenor-Defendants that Plaintiff maintained materials relating to political activities at the White House. Intervenor-Defendants are without knowledge sufficient to form a belief as to the truth of the allegations (a) that some of these materials are still located in the White House complex, (b) that Mr. Nixon has made requests for such materials or (c) that such materials have not been sent to Mr. Nixon.

8. Intervenor-Defendants admit the allegations in Paragraph 8, except as to the allegations concerning "personal and political materials" referred to therein, which have been answered in the preceding two paragraphs.

9. Intervenor-Defendants do not accept the definition of "presidential materials" of Richard Nixon alleged in Paragraph 9. Intervenor-Defendants have defined "presidential materials" to exclude the "purely personal materials" referred to in Paragraph 6 of the Complaint. Intervenor-Defendants deny the legal conclusions that the "presidential materials" generated and retained during the term of a President are the property of that President, and that Mr. Nixon is the owner of the "presidential materials" of his Administration. Intervenor-Defendants deny the characterizations and conclusions of law as to the ownership of the records of the Administrations of prior Presidents.

10. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 concerning Plaintiff's "awareness," "knowledge" and "reliance." Intervenor-Defendants also lack knowledge or information sufficient to form a belief as to the truth of the allegation that Plaintiff caused to be created and retained a substantial amount of materials which he would not have created or retained had he concluded that they were not his personal property to be used as he deemed appropriate. Intervenor-Defendants deny the characterizations and conclusions of law relating to statutory interpretation and the actions and attitudes of Congress and former Presidents.

11. Intervenor-Defendants deny the characterizations and conclusions of law relating to the United States Constitution and Supreme Court opinions alleged in

Paragraph 11. Intervenor-Defendants admit that some of the presidential materials embody, constitute or reflect communications between Plaintiff and his aides relating to the conduct of the Office of the President.

12. Intervenor-Defendants lack specific knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 12 concerning the nature of the communications described in the first sentence. Moreover, although they lack knowledge or information sufficient to form a belief as to the relative volume of materials which fit the description alleged in Paragraph 12, it seems likely that the relative number of such documents is "few" rather than "many" as alleged therein. Plaintiff's claim of privileges as to such material and his characterization of those privileges are conclusions of law which do not require an answer.

13. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 13.

14. Intervenor-Defendants admit the allegation in Paragraph 14 that shipment of the "presidential materials" of the Nixon Administration to California was temporarily deferred, but Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning the reason why the materials were not sent to Mr. Nixon's custody in California. Intervenor-Defendants specifically deny that none of the materials have been shipped to Plaintiff in California, and deny that the presidential materials are the property of the Plaintiff.

15. Intervenor-Defendants admit the allegation in Paragraph 15 that Mr. Buchen and other representatives of President Ford entered into discussions with a representative of Plaintiff concerning the presidential materials of the

Nixon Administration on or about September 3, 1974. Deny that the presidential materials are the property of Mr. Nixon to the extent that that is implied in paragraph 15. Intervenor-Defendants deny that the purpose of the negotiations was to assure the safety of the presidential materials or to assure the availability of such materials. Indeed, in the Agreement of September 6, 1974 between Plaintiff and the Administrator of General Services, Mr. Nixon was given the right to destroy the presidential materials, in their entirety, after a period of time.

16. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the allegation in Paragraph 16 concerning when Plaintiff learned or from whom Plaintiff learned that the Attorney General of the United States had been requested to give an opinion concerning the legal ownership of the presidential materials of the Nixon Administration. Intervenor-Defendants admit that the Attorney General rendered an opinion which concluded that title to the presidential materials was in former President Nixon. Intervenor-Defendants deny the characterization concerning the papers, documents and effects of every President of the United States.

17. Intervenor-Defendants admit the allegation in Paragraph 17 that Plaintiff and Defendant-Administrator of General Services entered into an agreement dated September 6, 1974. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 concerning Plaintiff's reason for entering into the Agreement and that Plaintiff was induced to enter into the Agreement.

18. The allegation in Paragraph 18 as to the statutory authority to execute the depository agreement is a characterization and conclusion of law which Intervenor-

Defendants deny. Intervenor-Defendants further state that as to the terms of the Agreement, the Agreement speaks for itself.

19-23. With respect to Plaintiff's allegations concerning "Some of the Terms and Conditions of the Depository Agreement" in Paragraphs 19-23, Intervenor-Defendants state that the Agreement speaks for itself. These allegations do not require an answer. Intervenor-Defendants deny the characterizations in Paragraph 23 as to motives and as to the matters that Mr. Nixon "recognized." Intervenor-Defendants also deny the conclusions of law alleged in Paragraph 23.

24. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24 concerning meetings between the Watergate Special Prosecution Force and Philip Buchen or members of his staff. Intervenor-Defendants admit that some of the presidential materials were not transferred to California but deny the characterization as to the effect of this action and deny the characterizations and conclusions of law alleged in the last sentence of Paragraph 24.

25-27. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 25 through 27.

28. Intervenor-Defendants deny the allegations of Paragraph 28 to the extent that they allege that Mr. Nixon is the owner of the presidential materials of his Administration, but otherwise admit the allegations of Paragraph 28. Intervenor-Defendants further state that the lawsuits referred to in Paragraph 28 sought other relief as well as that alleged in Paragraph 28.

29. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 29.

30. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30. Intervenor-Defendants specifically deny the conclusion of law that compliance with any subpoena that may have been issued will necessarily entail a breach of confidentiality of materials or violate any privileges and rights of Plaintiff.

31. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 31 concerning the service by the Special Prosecutor of eight subpoenas and the requirements of those subpoenas. Intervenor-Defendants also lack knowledge or information sufficient to form a belief as to the truth of the allegation in the last sentence of Paragraph 31 concerning the withdrawal of subpoenas previously served. Intervenor-Defendants admit that on November 9, 1974, Defendant-Administrator, Philip Buchen and H. Stuart Knight entered into an Agreement with the Watergate Special Prosecutor. Intervenor-Defendants state that the Agreement speaks for itself and deny the characterizations and conclusions of law contained in Paragraph 31 with respect to that Agreement.

32. Intervenor-Defendants admit the allegations in Paragraph 32 that on November 11, 1974 Plaintiff requested the Court to enter a restraining order against implementation of the November 9, 1974 Agreement; that the Special Prosecutor requested an Order permitting implementation; and that to date no order permitting the implementation has been entered. Intervenor-Defendants further state that to date no order restraining or denying implementation has been entered. Intervenor-Defendants deny the characterization of the Agreement contained in Paragraph 32 as a "search and seizure agreement."

33. Intervenor-Defendants admit that the Senators named in Paragraph 33 introduced a bill (S. 4016) on September 18, 1974 and deny the characterization of the purpose of the bill. Intervenor-Defendants further deny the allegations that the depository agreement was "statutory-based" and that the bill "confiscate[s]" materials.

34. Intervenor-Defendants admit the membership of the two Senators on the Congressional Committees as alleged in Paragraph 34 and the issuance of a subpoena by that Committee. Intervenor-Defendants state that the ruling of the United States Court of Appeals for the District of Columbia Circuit cited in Paragraph 34 speaks for itself and does not require an answer.

35. Intervenor-Defendants admit that the Senate and the Committees thereof took the actions as alleged in Paragraph 35 but deny that the measure was "controversial and historic." Indeed, a bill which passed both Houses of Congress by voice vote in three weeks was clearly without substantial controversy.

36. Intervenor-Defendants admit that the House of Representatives and the Committees thereof took the actions as alleged in Paragraph 36. The characterization of the legislation described therein is a conclusion of law and does not require an answer.

37. Intervenor-Defendants admit the allegation in Paragraph 37.

38. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 38.

39. Intervenor-Defendants admit the allegations of Paragraph 39.

40-50. Intervenor-Defendants state with respect to the allegations in Paragraphs 40 through 50 under the

heading "Various Provisions of the Statute," that the characterizations of the statutory provisions therein are conclusions of law for which answers are not required. The statute speaks for itself.

51-61. The allegations in Paragraphs 51 through 61 under the heading "Reasons for Invalidity of the Act" are conclusions of law which do not require answer. Nevertheless, Intervenor-Defendants state that they deny that Public Law No. 93-526 is unconstitutional, unlawful or void for any of the reasons listed in Paragraphs 51-61, or for any other reasons.

62. Intervenor-Defendants deny the allegations in Paragraph 62.

63. Intervenor-Defendants deny the allegations in Paragraph 63 except that they lack knowledge or information sufficient to form a belief as to the truth of the allegation in the last sentence of paragraph 63 concerning likelihood of injury to Defendant-Administrator,

64. Intervenor-Defendants deny the allegations in Paragraph 64.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Complaint should be dismissed becuase it is redundant of a case already pending before this Court, and in particular, because certain of the the relief sought by Plaintiff is already under consideration in another action pending before this Court that has been fully briefed and argued.

FOURTH DEFENSE

Certain of Plaintiff's claims for relief are not yet ripe for determination because their validity depends on the nature of the regulations the General Services Administration must promulgate under the Act. Those regulations have not yet been promulgated.

FIFTH DEFENSE

Plaintiff, as a former President, has no right to assert any presidential or executive privilege to bar access to the presidential materials.

SIXTH DEFENSE

Materials which reflect or relate to the acts, decisions or policies of the United States Government or the President of the United States and were prepared by and/or received by the President and/or the Executive Office of the President, or by presidential assistansts, staff members or agencies were and are the property of the United States Government and are not the property of Plaintiff Nixon.

Respectfully submitted,

/s/Robert E. Herzstein
Robert E. Herzstein

/s/Andrew S. Krulwich
Andrew S. Krulwich

/s/Mark J. Spooner
Mark J. Spooner

January 9, 1975

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(202) 872-6700

Counsel for Intervenor-Defendants
The Reporters Committee for Freedom of the Press,
American Historical Association,
American Political Science Association, *et al.*

[Caption Omitted in Printing]

ANSWER OF INTERVENOR-DEFENDANTS, LILLIAN HELLMAN, ET AL.

Intervenor-Defendants LILLIAN HELLMAN, *et al.* (hereafter "Intervenor-Defendants") answer the Complaint of Plaintiff Richard M. Nixon (hereafter "Plaintiff") as set forth below.

FIRST DEFENSE

Intervenor-Defendants answer the numbered paragraphs of the Complaint as follows:

1. Intervenor-Defendants admit the allegations of Paragraph 1, except that they deny the allegations, characterizations and conclusions of law contained concerning the Act of Congress referred to therein and its effect on Mr. Nixon's rights.

2. Intervenor-Defendants admit that this Court has jurisdiction to hear this action under 28 U.S.C. §§1331, 1332 and 1361, but deny that jurisdiction is properly based on 28 U.S.C. §§1346, 3456 and 2282. Intervenor-

Defendants admit that Defendant-Administrator is found in the District of Columbia and that the amount in controversy exceeds the sum or value of $10,000. Intervenor-Defendants further admit that many of the acts relating to the subject matter of this action occurred in the District of Columbia.

3-5. Intervenor-Defendants admit the allegations of Paragraph 3 through 5.

6. Intervenor-Defendants lack knowledge sufficient to form a belief as to the allegations of Paragraph 6.

7. Intervenor-Defendants lack knowledge sufficient to form a belief as to the allegations of Paragraph 7.

8. Intervenor-Defendants admit the allegations of Paragraph 8.

9. Intervenor-Defendants deny the allegations of Paragraph 9.

10. Intervenor-Defendants lack knowledge sufficient to form a belief as to the allegations of Paragraph 10.

11. Intervenor-Defendants deny the characterizations and conclusions of law relating to the United States Constitution and the Supreme Court opinions alleged in Paragraph 11. Intervenor-Defendants admit that some of the presidential materials embody, constitute or reflect communications between Plaintiff and his aides relating to the conduct of the Office of the President.

12. Intervenor-Defendants lack knowledge sufficient to form a belief as to the allegations of Paragraph 12.

13. Intervenor-Defendants lack knowledge sufficient to form a belief as to the allegations of Paragraph 13.

14. Intervenor-Defendants admit the allegation in Paragraph 14 that shipment of the "presidential materials" of the Nixon Administration to California was

temporarily deferred, but Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations concerning the reason why the materials were not sent to Mr. Nixon's custody in California. Intervenor-Defendants specifically deny that none of the materials have been shipped to Plaintiff in California, and deny that the presidential materials are the property of Plaintiff.

15. Intervenor-Defendants admit the allegation in Paragraph 15 that Mr. Buchen and other representatives of President Ford entered into discussions with a representative of Plaintiff concerning the presidential materials of the Nixon Administration on or about September 3, 1974. Deny that the presidential materials are the property of Mr. Nixon to the extent that that is implied in Paragraph 15. Intervenor-Defendants deny that the purpose of the negotiations was to assure the safety of the presidential materials or to assure the availability of such materials.

16. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the allegation in Paragraph 16 concerning when Plaintiff learned or from whom Plaintiff learned that the Attorney General of the United States had been requested to give an opinion concerning the legal ownership of the presidential materials of the Nixon Administration. Intervenor-Defendants admit that the Attorney General rendered an opinion which concluded that title to the presidential materials was in former President Nixon. Intervenor-Defendants deny the characterization concerning the papers, documents and effects of every President of the United States.

17. Intervenor-Defendants admit the allegation in Paragraph 17 that Plaintiff and Defendant-Administrator of General Services entered into an agreement dated

September 6, 1974 and lacks knowledge and information as to the other allegations.

18. The allegation in Paragraph 18 as to the statutory authority to execute the depository agreement is a characterization and conclusion of law which Intervenor-Defendants deny. Intervenor-Defendants further state that as to the terms of the Agreement, the Agreement speaks for itself.

19-23. With respect to Plaintiff's allegations concerning "Some of the Terms and Conditions of the Depository Agreement" in Paragraphs 19-23, Intervenor-Defendants state that the Agreement speaks for itself.

24. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 24 concerning meetings between the Watergate Special Prosecution Force and Philip Buchen or members of his staff. Intervenor-Defendants admit that some of the presidential materials were not transferred to California but deny the characterization as to the effect of this action and deny the characterizations and conclusions of law alleged in the last sentence of Paragraph 24.

25-27. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 25-27.

28. Intervenor-Defendants deny the allegations of Paragraph 28 to the extent that they allege that Mr. Nixon is the owner of the presidential materials of his Administration, but otherwise admit the allegations of Paragraph 28. Intervenor-Defendants further state that the lawsuits referred to in Paragraph 28 sought other relief as well as that alleged in Paragraph 28.

29. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 29.

30. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 30. Intervenor-Defendants specifically deny the conclusion of law that compliance with any subpoena that may have been issued will necessarily entail a breach of confidentiality of materials or violate any privileges and rights of Plaintiff.

31. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 31 concerning the service by the Special Prosecutor of eight subpoenas and the requirements of those subpoenas. Intervenor-Defendants also lack knowledge or information sufficient to form a belief as to the truth of the allegation in the last sentence of Paragraph 31 concerning the withdrawal of subpoenas previously served. Intervenor-Defendants admit that on November 9, 1974, Defendant-Administrator, Philip Buchen and H. Stuart Knight entered into an Agreement with the Watergate Special Prosecutor. Intervenor-Defendants state that the Agreement speaks for itself and deny the characterizations and conclusions of law contained in Paragraph 31 with respect to that Agreement.

32. Intervenor-Defendants admit the allegations in Paragraph 32 that on November 11, 1974 Plaintiff requested the Court to enter a restraining order against implementation of the November 9, 1974 Agreement; that the Special Prosecutor requested an Order permitting implementation; and that to date no order permitting the implementation has been entered. Intervenor-Defendants further state that to date no order restraining or denying implementation has been entered. Intervenor-Defendants deny the characterization of the Agreement contained in Paragraph 32 as a "search and seizure agreement."

33. Intervenor-Defendants admit that the Senators named in Paragraph 33 introduced a bill (S. 4016) on September 18, 1974 and deny the characterization of the purpose of the bill. Intervenor-Defendants further deny the allegations that the depository agreement was "statutory-based" and that the bill "confiscate[s]" materials.

34. Intervenor-Defendants admit the membership of the two Senators on the Congressional Committees as alleged in Paragraph 34 and the issuance of a subpoena by that Committee. Intervenor-Defendants state that the ruling of the United States Court of Appeals for the District of Columbia Circuit cited in Paragraph 34 speaks for itself and does not require an answer.

35. Intervenor-Defendants admit that the Senate and the Committees thereof took the actions as alleged in Paragraph 35 but deny that the measure was "controversial and historic." Indeed, a bill which passed both Houses of Congress by voice vote in three weeks was clearly without substantial controversy.

36. Intervenor-Defendants admit that the House of Representatives and the Committees thereof took the actions as alleged in Paragraph 36. The characterization of the legislation described therein is a conclusion of law and does not require an answer.

37. Intervenor-Defendants admit the allegation in Paragraph 37.

38. Intervenor-Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 38.

39. Intervenor-Defendants admit the allegations of Paragraph 39.

40-50. Intervenor-Defendants state with respect to the allegations in Paragraphs 40 through 50 under the heading "Various Provisions of the Statute," that the characterizations of the statutory provisions therein are conclusions of law for which answers are not required. The statute speaks for itself.

51-61. The allegations in Paragraphs 51 through 61 under the heading "Reasons for Invalidity of the Act" are conclusions of law which do not require answer. Nevertheless, Intervenor-Defendants state that they deny that Public Law No. 93-526 is unconstitutional, unlawful or void for any of the reasons listed in Paragraphs 51-61, or for any other reasons.

62. Intervenor-Defendants deny the allegations in Paragraph 62.

63. Intervenor-Defendants deny the allegations in Paragraph 63 except that they lack knowledge or information sufficient to form a belief as to the truth of the allegation in the last sentence of paragraph 63 concerning likelihood of injury to Defendant-Administrator.

64. Intervenor-Defendants deny the allegations in Paragraph 64.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Complaint should be dismissed because it is redundant of a case already pending before this Court, and in particular, because certain of the relief sought by Plaintiff is already under consideration in another action

pending before this Court that has been fully briefed and argued.

FOURTH DEFENSE

Certain of Plaintiff's claims for relief are not yet ripe for determination because their validity depends on the nature of the regulations the General Services Administration must promulgate under the Act. Those regulations have not yet been promulgated.

FIFTH DEFENSE

Plaintiff, as a former President, has no right to assert any presidential or executive privilege to bar access to the presidential materials.

SIXTH DEFENSE

Materials which reflect or relate to the acts, decisions or policies of the United States Government or the President of the United States and were prepared by and/or received by the President and/or the Executive Office of the President, or by presidential assistants, staff members or agencies were and are the property of the United States Government and are not the property of Plaintiff Nixon.

Respectfully submitted,

/s/Melvin L. Wulf
MELVIN L. WULF
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/s/John H. F. Shattuck
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[Caption Omitted in Printing]

MEMORANDUM OF THE SPECIAL PROSECUTOR IN RESPONSE TO THE COURT'S ORDER

The Special Prosecutor submits this memorandum in response to the Court's order of May 1, 1975, seeking each party's views on procedural issues relating to the hearing on the merits and disposition of this case. As explained below, because certain recent developments may meet the Special Prosecutor's interest in this lawsuit, the Special Prosecutor may seek to withdraw from the

proceedings prior to the final disposition of this case. Under these circumstances, we therefore believe it is appropriate to defer at this time to the views of the other parties on procedural issues, and we will accommodate ourselves to whatever procedures this Court adopts should it become necessary for the Special Prosecutor to continue active participation in the litigation.

The interest of the Special Prosecutor in the materials of the Nixon Administration is a well-defined one—to obtain use of the tapes and documents relevant and important to ongoing criminal investigations and prosecutions within the jurisdiction of the Special Prosecutor. The Special Prosecutor's need for these materials was recognized by President Ford, who authorized his Counsel to enter into an agreement providing the Special Prosecutor access to and use of the materials under carefully delineated procedures. The provisions of this agreement—referred to in these proceedings as the November 9th Agreement—are embodied in the regulations issued by the Administrator under Section 102(d) of the Presidential Recordings and Materials Preservation Act which, in general terms, authorizes access to these materials by executive branch agencies or departments for lawful government use. See 41 C.F.R. §105-63.302-1, 40 Fed. Reg. 2671 (January 14, 1975).

Former President Nixon, in the instant litigation, seeks injunctive relief not only against the Act, but also against implementation of the November 9th Agreement. To protect his ability to obtain necessary tapes and documents from the Nixon Administration materials, under both the statute and the November 9th Agreement, the Special Prosecutor sought to intervene in these proceedings. In doing so, he was prepared to argue, as he did earlier in *Nixon v. Sampson,* D.D.C. Civ. No. 74-1518, that whether or not Mr. Nixon has rights in these materials sufficient to prevent

access to them by private citizens, he has no right to prevent their lawful use by government agencies, especially in the face of a finding by the incumbent President that their use was necessary to the public interest. The Special Prosecutor, in seeking intervention, also was prepared to argue that the statute itself is a constitutional exercise of power by Congress.

From the outset, however, the Special Prosecutor has stressed in the various proceedings relating to these materials that his need was for *prompt* use of them. Because implementation of the November 9th Agreement was barred by an existing court order in *Nixon v. Sampson, supra,* the Special Prosecutor entered into discussions with counsel for Mr. Nixon in order to find ways consistent with that order to satisfy the needs of this Office. As a result of those discussions, the Special Prosecutor and counsel for Mr. Nixon agreed upon procedures whereby, with the consent of both Mr. Nixon as well as the incumbent Administration, the Special Prosecutor would recieve the tapes and documents he has reason to believe are relevant and important to investigations and trials still being conducted by his Office. As of this date a substantial number of the relevant files have been reviewed, and the Special Prosecutor's Office has received a great many pertinent documents. Additionally, we have received or listened to a number of tapes of recorded conversations. Under these existing procedures, we expect that within the relatively near future we will have received substantially all the materials for which we have indicated a need.

Given this development, it is likely that the interest which led the Special Prosecutor to intervene in this litigation will become mooted. Once we receive use of the necessary materials of the Nixon Administration, there will be no reason for us to seek future implementation of

the November 9th Agreement. Accordingly, we believe that fairness to the Court and the other parties requires us to defer to the views of these other parties on the issues raised by the Court. If the situation should change, and it remains necessary for us to continue active participation in the litigation, we will accommodate ourselves to whatever schedule or procedures are approved by the Court.[1] Until we receive substantially all of the materials we are now seeking, however, we cannot withdraw from the litigation at this time.

Respectfully submitted,

HENRY S. RUTH, JR.
Special Prosecutor

PETER M. KREINDLER
Counsel to the Special Prosecutor

RICHARD J. DAVIS
Assistant Special Prosecutor

KENNETH S. GELLER
Assistant Special Prosecutor

Attorneys for the United States

Watergate Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005

[1]The only issue upon which we might have to offer evidence involves the past practice of incumbent administrations in using materials of past administrations for continuing government business.

[Caption Omitted in Printing]

PLAINTIFF NIXON'S EVIDENTIARY SUBMISSION

In accordance with the pre-trial order entered by this Court on June 13, 1975, Plaintiff, by his counsel, herewith submits, in connection with his evidentiary presentation, a request for admissions together with 1) four affidavits, 2) a description of the White House taping system, 3) four documentary items, and 4) a summary of the testimony given by John Nesbitt in the consolidated cases pertaining to issues pending before this Court.

The four affidavits submitted at this time include that of the Plaintiff, John S. D. Eisenhower, William J. Hopkins, and Raymond G. Larroca. In the request for admissions, Plaintiff asks that the Defendants admit that if the four affiants were called to testify in this proceeding their testimony on direct examination would be as set forth in the affidavits.

In addition to the affidavits submitted herewith, Plaintiff, on June 20, 1975, provided counsel for the government-defendants four proposed affidavits prepared following interviews with government personnel. A fifth affidavit was provided on June 27, 1975. Although counsel for Plaintiff understood that these affidavits would be approved, or revised, and returned to Plaintiff for submission to the Court by this date, counsel for the government have indicated that they did not so understand. Consequently, at such time as they are completed, Plaintiff will submit the affidavits of Mr. John C. Broderick, Mr. Richard Jacobs, Mr. Frank Matthews, Mr. Thomas P. Wolf, and Mrs. Gertrude Fry.

Plaintiff intends to submit one additional affidavit that is not available at this time. Mr. John R. Hubbard, President of the University of Southern California, is

presently traveling in Saudi Arabia and Plaintiff's counsel have not been able to discuss with him the proposed affidavit describing, on behalf of the University, the plans for creation of a Presidential Library in Los Angeles to house, for purposes of research and analysis, the materials of the Nixon Administration. Mr. Hubbard is expected to return sometime next month, and counsel will discuss with him his affidavit at that time. We hope to be able to submit this affidavit by the end of July.

Finally, on June 11, 1975, Plaintiff sent letters to each of the existing Presidential Libraries, with copies to all counsel, posing various questions concerning the nature of certain of the materials deposited in the Presidential Libraries and the operation of those libraries as it relates to issues pending in this litigation. To this date we have not received a reply to any of the inquiries. However, we are informed by counsel for the government-defendants that replies will be forthcoming. At that time we may seek to supplement this evidentiary presentation.

Respectfully submitted,

/s/Herbert J. Miller, Jr.
Herbert J. Miller, Jr.

/s/Raymond G. Larroca
Raymond G. Larroca

/s/William H. Jeffress, Jr.
William H. Jeffress, Jr.

/s/R. Stan Mortenson
R. Stan Mortenson

MILLER, CASSIDY,
LARROCA & LEWIN
2555 M Street, N.W., Suite 500
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(202) 293-6400

Dated: June 30, 1975

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD NIXON

County of San Diego
State of California ss:

Richard Nixon, being duly sworn under oath, deposes and says as follows:

1. I am a citizen of the United States and a resident of the State of California, my residence being at San Clemente, California.

2. From January 3, 1947 to November 30, 1950 I served as a Member of the House of Representatives. From December 1, 1950 to January 1, 1953 I served as a United States Senator from the State of California. Thereafter, from January 20, 1953 until January 19, 1961 I served as Vice President of the United States. I was elected President of the United States and served in that office from January 20, 1969 until my resignation on August 9, 1974.

3. During the time I served in each of these four Constitutional offices as it was my practice to retain and preserve nearly all of the materials produced or received by myself or my staff. Following the practice of all other Congressmen, Senators and Vice Presidents, when I left those offices I took with me all the materials and memorabilia my staff and I had accumulated. When I resigned the office of President, however, I left in the White House not only the materials my staff and I had accumulated during five and one half years there, but a large quantity of the materials that I had brought with me at the time I assumed office. I had no intention of leaving any of these materials in the White House permanently, and left instructions with members of my staff to arrange for their immediate shipment to me in

California. To this date I have not received any of the presidential materials I left in the White House on August 9, 1974. I have since received some of the pre-presidential materials that were impounded in Washington for more than six months. Although it is difficult to recall specific items without having access to the materials presently retained in Washington under court order, I know that many items dating from the pre-presidential period prior to January 20, 1969, are still impounded with the presidential materials of my Administration. For example, I know that copies of my personal medical records and my appointment calendars for years preceding 1969 are still being held there.

4. It is difficult to describe the nature of the materials that were generated or retained by me and members of my staff while I was President because of their almost limitless variety. A significant portion consists of correspondence between myself and others and correspondence between members of my staff and others. Another large portion of the presidential materials consists of memoranda sent to me, or sent by me to members of my staff, or circulated among members of my staff. In addition to correspondence and memoranda, these materials include, among other things, various reports, briefing books, photographs and audiovisual materials, speech drafts, pamphlets, recordings and diaries.

5. Even more extensive than the variety of presidential materials is the variety of the subject matter reflected in them. This stems from the fact that the President serves not only as the nation's Chief Executive but is a major force in foreign affairs, a formulator of domestic policy, a leader of his political party, a politician in his own behalf, a private citizen with personal friends and associates, and a husband and father to his family. To the

extent he and his staff generate or receive materials relating to any or all of these areas, they are included among his presidential materials. In my case, the presidential materials reflect all of the above, and frequently in such ways that to attempt to disassociate one from the other would be impossible.

6. The presidential materials of my Administration include thousands of items which were prepared or otherwise accumulated in connection with the performance of my constitutional obligations. For example, as President I was required under the Constitution to report to Congress from time to time concerning the state of the union. Each of my State of the Union messages are a matter of public record preserved in official public documents. The preliminary drafts and supporting materials gathered in connection with the preparation of those drafts are not matters of public record, however, because they were prepared exclusively for my use. I prepared many of them personally, often working alone into the early hours of the morning writing and rewriting in long hand form the final text for each of my State of the Union addresses. These drafts reflect my personal thoughts and the procedure I followed in preparing a comprehensive look at the State of the Union. The drafts and supporting materials for my State of the Union addresses as well as all my other addresses are now included among my presidential papers.

7. Another example of the presidential materials that were generated in connection with my performance of constitutional duties are those having to do with the signing or vetoing of bills passed by the Congress. When the Congress enacted legislation I would receive from my aides in the White House, from other officials of the government, and sometimes from private citizens or

organizations, their recommendations concerning what action I should take. I always desired that such recommendations—whether in the form of oral reports, memoranda, or correspondence—represent the individual's or author's candid and forthright opinion concerning the advisability of my signing into law the particular legislation in question. If I decided to veto the legislation, then I, or members of my staff, would prepare veto messages to Congress. Such messages were usually prepared in draft for my review. Sometimes I would reject the draft; other times I would personally revise it. In any event, only the veto message sent to Congress became a matter of public record. The working drafts and all of the materials reflecting the advice I had received were retained for inclusion among my presidential papers.

8. Not all of the advice and recommendations I received as President with regard to the performance of my constitutional obligations came to me in the form of documents. It was my practice to discuss with my aides, other officials of government, members of Congress, representatives of different organizations, and private citizens, their opinions on such matters as the preparation of legislation, the signing or vetoing of enrolled bills, and even the commencement, continuation or termination of military action. Most often such discussions took place in the Oval Office of the White House or in my office in the Executive Office Building. I found that such discussions were frequently more candid and consequently more valuable to me in my decision-making than those which came to me in other forms. I also found that such discussions permitted me to explore a complete range of thoughts, opinions and options. For example, I would be able to elicit from my aides, Cabinet members, Congressmen and Senators, and others their feelings concerning not only the wisdom of a particular course of action, but

their blunt assessments of possible ramifications upon foreign or domestic policy, as well as potential political effects. I assumed that such opinions were given in confidence to assist me as President, and that they would not be publicly disclosed. Just as important, those who gave me their opinions must have so assumed. Otherwise, their advice would have been less candid and less valuable, particularly if they thought that their advice would be rejected and they would be held accountable publicly for what later might appear to be erroneous or even stupid.

9. As I have indicated, not all of a President's materials deal with his activities as Chief Executive. Many reflect the fact that the President also serves as the head of his political party. In this regard I and members of my staff would often correspond with federal, state and local political officeholders and local political party officials. Such correspondence usually dealt in major part with partisan political matters. I also received memoranda concerning purely political matters from members of my staff and other government officials. For example, during my term as President I was requested on innumerable occasions to address political gatherings. Prior to such appearances members of my staff prepared for my personal use a "briefing book". These note books contained exclusively political material. They listed, for example, all of the local political officials who would be in attendance and would describe their biographical background, their positions on various issues, and often personal vignettes that would be helpful to me in meeting and talking with them. The briefing books also described the issues that would be of concern to the organization or people requesting the appearance. If the appearance was on behalf of a local politician, the briefing book would describe the strengths and weaknesses of both the

candidate and his opponent and where they both stood on matters of local and national concern. The briefing books also set forth suggestions for my remarks. I would frequently edit these drafts, noting additional points I wanted to make, and generally recording my thoughts as they pertained to the appearance. It is my recollection that there were hundreds of such briefing books prepared for my use. Similar books were prepared on legislative strategy, press conference briefings and literally hundreds of meetings I had in Washington and elsewhere with business, labor, education, religious and other groups concerning the whole fabric of American society. These books were retained and are among my presidential materials.

10. As was the case with matters dealing with my duties as a constitutional officeholder, it was also my practice in my role as head of my political party to engage in extensive and frequent discussions with members of my staff, members of Congress, other officials of government, governors and state officials and personal friends and associates concerning a multitude of political matters. Many of those discussions were held in the Oval Office or my office in the Executive Office Building. Such discussions included, for example, whether I should support certain candidates for elected office and, if so, what form that support should take. In these discussions purely personal matters were often inextricably intermixed with political matters, and it would be virtually impossible to separate the various combinations of views and opinions expressed in them.

11. While President I also received a great deal of correspondence from private citizens ranging in topics from the prosecution of Lieutenant William Calley to the need for national health care. Sometimes the correspondence was from someone such as former Secretary of

Agriculture Ezra Taft Benson offering his opinions on our relations with the Soviet Union. At times, I would receive the suggestions of the economist and business consultant Pierre Rinfret concerning economic problems and forecasts. In sum, literally hundreds of letters arrived at the White House each day from persons who wished to express their thoughts on an infinite variety of topics. Some letters offered congratulations to my wife and me on our anniversary or our birthdays. Other times parents wrote concerning their hopes for the lives of their children as they grew up in a troubled time in this country's history. Thousands of school children also sent me their own personal messages every year. I could not read all of this correspondence each day, but I naturally read the more important letters and I consistently read samples of the rest. All of it is among my presidential materials.

12. As I have previously stated, my presidential materials also reflect the fact that while in office I continued to function as a private citizen, husband and father. As a private citizen I engaged in correspondence with friends, associates and other individuals. This correspondence did not necessarily pertain to my activities as a constitutional officeholder or even to political matters. For example, I can recall correspondence between myself and law school friends concerning our class reunion. I can also recall some personal letters I wrote to families of young men killed in action in Vietnam. These letters, of course, were of little import to the nation or to anyone except myself and the recipient. Often, such personal letters were written in my own hand. Although I believe it would be an invasion of my privacy and that of others to be required to reveal the identity of persons with whom I corresponded, I believe it is important to provide an example of the type of

personal correspondence that exists among my presidential papers. On one occasion I recall writing Mr. E. Guy Warren concerning an unpopular but important stand he had taken on a controversial subject. On another occasion I corresponded with members of my law practice concerning the circumstances under which my membership in the firm should be terminated. Other personal letters were sent to such persons as Mrs. Earl Warren, General J. D. Hughes, Elmer Bobst, Mrs. Lyndon Johnson, Patrick J. Buchanan, William Rogers, Mrs. Alice Roosevelt Longworth, Mrs. Bernard Brennan, Leonard Garment, and then Congressman Gerald R. Ford.

13. The personal documents included among my presidential materials go beyond personal correspondence. Because of the long hours that I was required to spend away from my family while President and even before that as Vice President, Senator and Congressman, my daughters adopted the practice of leaving personal notes at my office or in my residence so that at the end of the day, if they were not around, I would have at least a moment or two to learn what they had been doing or what their feelings or reactions were to my own activities. I valued, and still do, all of these very private and highly personal thoughts and deliberately preserved them among my presidential materials.

14. My habit of preserving personal notes and communications applied also to certain of my closest friends and associates. I can recall that sometimes during a Cabinet meeting I would be sent a note by someone present suggesting that I emphasize a particular point or congratulating me on a statement I had just made. Such notes too found their way into my presidential materials.

15. My presidential materials also include many personal mementos. For example, my wife and I, as

earlier first families had done, maintained a guest book which we requested our visitors in the White House to sign so that we could have a memory of our years in that great house. I also retained among my presidential materials mementos given me by the various brigades at the Naval Academy when I delivered the commencement address in 1974, and commemorative items from my two inaugurations. It is difficult for me to remember all of the mementos my wife and I preserved among my presidential materials, but I do know that like all mementos they were quite personal and not things I would show or discuss with persons other than my family and close friends.

16. The conversations I had in the Oval Office and in the Executive Office Building frequently included discussions of purely personal matters. It is impossible for me to catalog the myriad topics of such private discussions. I can only state that I had such conversations nearly daily and often several times during the course of a day with my wife, my daughters, personal friends, close staff members, and other persons. On occasion, for example, I would meet with a member of Congress who I counted also as a close personal friend. During such a meeting we might discuss matters pending before Congress, political matters of interest to us both, or personal matters having to do with our families, our respective interests in business, or any other thing that was on our minds. Such conversations were rarely, if ever, structured in such a way that the subjects could be separated in a logical or a compartmentalized fashion.

17. In my capacity as a private citizen I also, on occasion, had discussions in my offices with my personal physician concerning my health, a subject which I would not and did not discuss with others. I talked candidly with my personal attorneys about confidential matters.

And finally, on other occasions, I met and talked with clergymen and counsellors whom I considered to be personal clergy about matters I trusted and assumed they would not recount to others.

18. Also included among my presidential materials are copies of portions of my own personal diary. During various periods during my years as President I recorded dictabelts at the end of the day on which I expressed my reflections, thoughts, ideas and concerns with regard to the activities and events of that day. I considered this dictation exceedingly private and would therefore express many thoughts and opinions which I would not have conveyed to any but my closest friends and some to none other than my personal secretary. At times I expressed my frustrations, my feelings of exhilaration, or other emotions experienced throughout the day. I intended to preserve these diary dictabelts for later use in preparing my memoirs and I consider them extremely important for refreshing my memory as to my thoughts and feelings as they occurred. Some transcriptions of these dictabelts and some of the dictabelts themselves are among my presidential materials. To my knowledge the diary dictabelts are not labeled and only by listening to them would it be possible to determine what they are or what period they cover.

19. I have learned that also included among my presidential materials retained in the White House are my wife's personal files which were generated both before and during my tenure in office. Her files, too, are quite varied in nature and reflect a myriad of activities. One example is her record pertaining to the White House restoration project which was funded entirely by private contributions and which she voluntarily initiated and supervised. Many of my wife's personal letters and correspondence are also among my presidential materials.

20. Having served in constitutional offices of this country for a period exceeding twenty-five years, five and a half in the office of President, it is my opinion that the confidentiality of a constitutional officeholder's communications with the members of his staff, and between him and other individuals, must be preserved in order to assure the type of free-wheeling, candid, and often blunt or critical advice that is so vital to the performance of his office. The number of examples I could give to demonstrate the basis for my opinion would be virtually endless. I can state from my own experience that a President must be in a position to talk freely with his advisors or, for that matter, with members of Congress in order properly to carry out his activities in office. I can recall an instance in w ch the ranking minority member of a House Committee informed me about a personal problem involving the Committee's Chairman. It was important that I be aware of this in order to be in a position to determine what course of action to take on particular legislation. I do not believe the ranking minority member would have felt free to discuss this delicate situation if he had believed that his communication would later be made public. The same kind of frankness and even bluntness was also necessary when members of my Cabinet competed among themselves to obtain from me a particular decision with respect to a program or action of interest to them. Frankness was also important when my advisors discussed options for initiatives in foreign affairs and domestic policy. Suggestions would be presented, discussed, altered, dropped, reconsidered and, sometimes, implemented. But it was always essential to be assured that such discussions would not subsequently become public. If the President and his advisors had thought that their discussions were to be published and publicized, they would undoubtedly have

been far more cautious and far less frank and free-wheeling. These discussions, if made public even now, would not necessarily jeopardize the national security or be embarrassing to the participants, but they would surely chill the willingness of persons in similar positions now and in the future to engage in such candid and robust discussions for fear that their thoughts too may be made public by congressional act. Revelation of confidential discussions that occurred during my term in office, even though not necessarily embarrassing to the participants, might nevertheless have a direct impact on their ability to adopt similar or, for that matter, different positions in the future. This chilling effect may be felt by those presently holding public office who have expressed to me privately their thoughts, impressions and philosophies. Or it may impact upon persons such as Governors and state legislators who talked freely in my office and who in the years to come may desire to run for other elected positions. Beyond these few examples, the potential ramifications could be enormous for the lives of literally hundreds of persons whose futures depend upon their ability to express themselves freely and unimpeded by public disclosure of their discussions with me—discussions held with the expectation that they would remain confidential. I could not have instituted dramatic changes in foreign policy had I received advice that was anything but unvarnished. The opening to China, our new relationship with Russia, and new initiatives to dampen the powder keg in the Middle East are but a few of the available examples. The necessity of st aight-from-the-shoulder advice is not limited to national security matters but also to such crucial domestic issues as were involved in my decisions on desegregation of schools in the south, the cleaning up of the environment, revenue sharing and reforming our welfare structure. Such highly

controversial actions required advice covering all spectrums. To make the right decisions, it is absolutely indispensable for the President to have all possible options—even though some of those options in retrospect would appear wrong. Those who give advice must be able to do so with the total confidence that they will not be held unfairly accountable if the advice proves faulty or not accepted. All those who are sought out for counsel by the President deserve a complete hearing with the knowledge that the counsel they give is not merely what the President wants to hear but what they believe he should hear. I can only suggest that to legislate the required disclosure of such conversations was to act preciptiously and without thought of the enormity of the ramifications that would arise.

21. While I was in office and at the time the tape recordings of conversations in the Oval Office and my office in the Executive Office Building and elsewhere were made and my other presidential materials were generated, neither I nor the members of my staff expected that any of my presidential materials, and certainly not the tape recordings of my confidential conversations, would ever be disclosed to the public, at least without my express authorization. This expectation of confidentiality stemmed from the fact that every previous President had taken with him at the time he left office all of his presidential materials and had disposed of those materials in whatever way he deemed appropriate. I was also aware that in those instances in which the President died while in office, members of his family exercised ownership rights with respect to his materials and preserved their privacy and confidentiality.

22. I was also aware at the time I served as President that many Presidents before me had utilized their

presidential materials after they left office to prepare their memoirs and reminiscences of great events that occurred during their Administrations. In particular, I was aware that Presidents Hoover, Truman, Eisenhower and Johnson had each published one or more volumes recounting periods of their presidencies.

23. The installation of the recording capability for conversations in the Oval Office and Executive Office Building and elsewhere stemmed in large part from a recommendation I received from President Johnson by way of a close mutual friend. President Johnson sent word to me that he had learned that as one of my first actions upon arriving at the White House I had ordered the removal of the recording devices he had installed there. President Johnson said that the recordings he had made of his conversations while President had proved to be exceedingly valuable in preparing his memoirs and he urged that I reinstall the recording devices. Thereafter, I consented that this be done, having the expectation that I, like President Johnson, would retain during my life exclusive control over access to the recordings and that after my death they would be placed in a Presidential Library with restrictions prohibiting access for a sufficiently long period of time that no participant in conversations with me would incur any adverse effects. It was further my intent that before placing the recordings in a Presidential Library I would delete from them conversations containing purely personal discussions such as those with members of my family and friends.

24. My intent with regard to the ultimate disposition of the White House tape recordings has not changed. Despite the provision in a letter I wrote on September 6, 1974 to Mr. Arthur Sampson, Administrator of the General Services Administration, calling for destruction of the tape recordings after September 1979 in the event

of my death and no later than September 1984, it was always my desire and intention to preserve for scholars in generations to come the tape recordings of my presidency so that they would have available a full and valuable historical tool. I viewed the depository agreement of September 7 as purely a temporary arrangement necessitated by the fact that I had left office prior to the finalization of plans for a Library to house my presidential materials. When counsel to President Ford recommended to my attorneys the provision calling for automatic destruction of the recordings as of five years from the date of the instrument, I viewed the suggestion as strictly an interim measure to insure that in the event I died before completing arrangements for a Presidential Library, the White House recordings would not be available for unauthorized public disclosure.

25. The depository agreement itself was solely the product of my understanding that it was required in order for the incumbent Administration to receive the agreement of the Special Prosecutor to transport the materials to California. I was informed through counsel that without the depository agreement none of the materials would be shipped. Thus, the provision concerning joint control over access between myself and the General Services Administration and the provision guaranteeing that all material would remain available by subpoena for at least five years were expressly included to accommodate the interests of the Special Prosecutor.

26. Since the time that the temporary depository agreement was executed, I have engaged in lengthy discussions with officials of the University of Southern California in Los Angeles. Those discussions have culminated in an understanding between the University and myself whereby I have agreed to designate a library facility to be constructed by the University as the

depository for all of my presidential and pre-presidential materials which I will donate as a gift to the United States with the condition that they be housed at the University of Southern California facility. Implementation of my understanding with the University of Southern California rests in large part upon whether my presidential materials will ultimately be available for such disposition as I direct. However, I have informed the University that it is my intent to utilize its Presidential Library as the depository of my presidential materials, following the practice of Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy and Johnson. Also, following the practices of former Presidents, it is my intent to utilize the assistance of members of the National Archives staff to review portions of my presidential material. Like Presidents Truman, Eisenhower and Johnson, I intend to request the opportunity to assist in the selection of the archivists who will be reviewing the files that I have described as containing my personal materials. And, of course, I intend to reserve for my own review those materials which I consider to be so private and confidential that no one else should participate in the initial review.

27. Apart from the White House tape recordings, others of my presidential materials were created as a result of information I had concerning President Eisenhower's practices while in office. I was aware that President Eisenhower always had a member of his staff record notes of his meetings with visitors. Following the meeting, the staff member would prepare a memorandum for the President's file. These memoranda, though not as accurate accounts as tape recordings, nevertheless provided a record of the discussions. President Eisenhower, after leaving office, utilized these memoranda in the preparation of his memoirs, much as President Johnson

utilized his tape recordings. President Eisenhower's son, John S. D. Eisenhower, informed me of this fact shortly before I assumed office. I adopted the practice during my Administration and these memoranda of my meetings are now included among my presidential materials.

28. At the time I authorized my counsel to initiate this suit challenging the constitutionality of the congressional act seizing for purpose of public disclosure the presidential materials of my Administration, I was aware that the Special Prosecutor had taken steps to gain direct access to those materials without my authorization or consent. I felt that in light of the Supreme Court's decision in *United States v. Nixon,* that the Special Prosecutor was entitled to receive such of the presidential materials as were demonstrably relevant to his criminal investigations, but was not entitled to gain the type of unrestricted direct access that would permit members of his staff to review my personal and presidential materials without the safeguards provided by subpoena or search warrant procedures. Beyond that, it was my opinion that neither Congress nor civil litigants seeking access to the materials under the Freedom of Information Act had any lawful right of access. Consequently, I authorized my counsel to discuss with the Special Prosecutor procedures that might be utilized to provide his office with relevant items from among the presidential materials. In a spirit of compromise, an accommodation was reached and I am informed that the Special Prosecutor has now received those items which he desires. Aside from the interests of the Special Prosecutor, however, I have directed my counsel to continue to seek a judicial determination as to the constitutionality of the legislation and the validity of claims for access based upon rights asserted under the Freedom of Information Act.

29. It has now been just less than one year since I resigned from the Presidency. For six months of that period I had no access whatever to my pre-presidential materials which remained in the White House when I resigned and to which no one claimed any right of ownership or control. And today, even though for nearly two hundred years former Presidents of the United States have been considered the owners of their presidential materials, the materials of my Administration have been impounded at a location nearly three thousand miles from my home in California and under restrictions which prevent any access by me or my authorized agents for any purpose other than to comply with requests for access by the Special Prosecutor or demands for production of materials pursuant to subpoenas. These restrictions and the retention of the materials in Washington have precluded me from reviewing any of my presidential materials in connection with the preparation of the memoirs which I have already begun. It has also deprived me of eleven extremely valuable months that I could have used to review, organize, categorize and otherwise prepare the materials for inclusion in a Presidential Library. I am sixty-two years old and desire to complete the task of reviewing my presidential materials during my lifetime. Each month that these materials remain unavailable for that purpose can never be recaptured and thus represents an invaluable loss. The same is true with regard to my desire to have access to my presidential materials in preparing my personal memoirs. I value quite highly the need to have such access and do not feel that I can adequately complete either project without it.

30. Because I have already agreed to donate my presidential materials to the United States to be included in a Library at the University of Southern California, this

affidavit is not being filed, nor is the suit in which it is submitted being pressed, solely in my own behalf. As with so many important questions, there is a principle involved. Presidents, Vice Presidents, Senators, and Members of the House of Representatives and the Judiciary all carry great burdens of public service. They must make the best decision possible when matters great or small come before them. In this regard the principle of confidentiality permeates each constitutional office. Thus, I am filing this affidavit in support of that principle as well as the principle of privacy which applies more directly to me personally.

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Richard Nixon, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing affidavit, and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

/s/Richard Nixon
RICHARD NIXON

Subscribed and sworn to
before me on June 25, 1975.

/s/David C. Welch
DAVID C. WELCH
Notary Public in and for the
County of San Diego and State of California

[SEAL]

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN S. D. EISENHOWER

County of Montgomery)
) ss.
State of Pennsylvania)

John S. D. Eisenhower, being duly sworn, hereby deposes and says:

1. My permanent residence is in the State of Pennsylvania.

2. At the present time I am serving as Chairman of the President's Advisory Committee on Refugees.

3. I am the son of Dwight David Eisenhower, who was President of the United States from January 20, 1953 to January 20, 1961.

4. During the period June 6, 1944 to March 27, 1963, I served as a regular officer in the United States Army. I am currently a Brigadier General in the United States Army Reserve.

5. During various periods of my military service I was stationed near Washington, D. C., and was able to work closely with my father and members of his staff during his term as President. For the last twenty-seven months of his term in office I worked as a Staff Assistant to my father in the White House. During the course of my work at the White House, and through discussions with my father and his aides, I acquired a general knowledge of the nature of the workings of the Presidency and a specific knowledge of the daily operations of the White House Office. After President Eisenhower left office, I continued to work directly with him in a capacity I will more fully describe below.

6. It was President Eisenhower's practice while in office to have at least one of his staff members attend nearly all meetings between the President and others, whether they were heads of foreign states, Members of Congress, government officials or private citizens. Following the meeting, the staff member would prepare a memorandum for the President's file setting forth a description of the meeting, the substance of the subjects and viewpoints discussed, and the course of action, if any, to be taken thereafter. These memoranda were prepared at the direction of and exclusively for the use of the President.

7. Notes were also taken of the substance of matter discussed at all cabinet meetings.

8. It was also President Eisenhower's practice to have his personal secretary, Mrs. Ann C. Whitman, listen on an extension telephone to most all of his conversations in the oval office and to record by notation the substance of the conversations. These notations were subsequently transcribed and made available to the President. Thereafter they were included in the President's files.

9. Neither the memoranda of President Eisenhower's meetings nor his secretary's notes of the Presidential telephone conversations were prepared for public use or review. All of the notes and memoranda, however, were available to my father after he left office and were used by him as an invaluable resource in preparing his memoirs for publication.

10. During President Eisenhower's term in office he engaged in extensive correspondence with a number of persons. On occasion the President would seek out the opinions and recommendations of one or more members of the public and private sectors of the nation. In

response he received candid and frank statements of the writers' views.

11. Some of the topics encompassed by the President's correspondence pertained to the President's constitutional duties, such as the signing of and vetoing of enrolled bills passed by Congress. Others related to the President's duties as a leader of the nation, such as the formulation of economic policy. Another category concerned the President's duties as the head of his political party. This correspondence was retained in files maintained by the President's personal secretary (to this date referred to as "the Whitman files").

13. Near the conclusion of my father's second term as President, I began the process of arranging for the disposition of all of the materials generated by or retained within the Office of the President during his Administration. Through conversations with President Eisenhower and others, I was aware that prior to the time my father arrived in the White House on January 20, 1953, the prior administration had removed from the White House and Executive Office Building offices all staff and central files pertaining to the work of that administration. My father informed me that the only material left for him was a single page of instructions to be used in the event of national crisis and National Security Policy Documents. All other files had been removed. We were informed that this same general procedure had been followed by every prior administration, and we determined that we would adopt the same policy.

14. An integral part in determining the disposition of the Eisenhower presidential papers was the preparation and execution of the letter of intent dated April 13, 1960, addressed to Mr. Floete from President Eisenhower. As that letter of intent indicates, President

Eisenhower, in donating his materials to the United States, placed under seal those papers which contain "statements made by or to [President Eisenhower] in confidence, papers relating to family or private business affairs, papers containing statements which might injure or harass individuals or their families" and "such other individual files as I, or my representative or the Administrator of the General Services may specify." It was thus that President Eisenhower decided to maintain the confidentiality of the documents he desired not to be made public.

15. To begin the task of packaging the presidential materials for shipment from the White House, White House Staff Secretary, A. J. Goodpaster, prepared a memorandum to be sent to all members of the White House staff directing them to package at least 75 percent to 90 percent of their individual files and deliver them to a temporary storage area preparatory to transfer to Abilene, Kansas. This memorandum was circulated approximately December 15, 1960, and the requested deadline for packaging and transfer was December 23. On January 11, 1961, a second memorandum was sent by Wilton Persons to all staff members reiterating the directive for packaging of the Eisenhower Presidential files. In this memorandum, the staff was told to "...clear out every last possible paper (other than strictly personal) from their files!!!" and to box, label, and place them in the custody of GSA by the end of the day, January 16. Nothing was to be left in any office that was not "completely essential."

16. With regard to the material, if any, that was to be left for the incoming administration, the memorandum directed, that such items should be "cleared with the President" through the office of staff secretary.

17. On the afternoon of January 19, 1961, within hours of the inauguration of John F. Kennedy, I personally toured the staff offices and gathered several storage cabinet safes that had not previously been prepared for shipment. Apart from these safes, there were no files nor other items of Presidential materials left for the incoming administration.

18. With respect to the President's personal files, they had previously been packaged for shipment to President Eisenhower's future office in Gettysburg. The only material left by President Eisenhower for President Kennedy was a sachel containing a series of orders and instructions to be of assistance in the event of nuclear attack or other national crisis.

19. After leaving office, President Eisenhower retired to his home in Gettysburg. A principal activity thereafter, for several years, was the review of his Presidential materials and the preparation of his memoirs. I accompanied my father to Gettysburg and assisted him in these activities.

20. Among the tasks I undertook at my father's request and as his direct personal representative was to review all of the memoranda of Presidential meetings. President Eisenhower directed me to reclassify them from whatever classification they then held to "privileged." See Exhibit A. This classification was intended to reflect the fact that the memorandum embodied confidential communication between the President and his aides.

21. On January 18, 1961, two days before leaving office, my father authorized eight persons within the limits of the security division to have access to his Presidential papers for the purpose of assisting him in their compilation. Therefore I was the only person at Gettysburg other than the President who had total access to his files.

22. During the time President Eisenhower's personal files were at Gettysburg, but at least three years after my father left office, I am aware of at least two instances in which he granted permission to an author or historian to have supervised access to certain strictly limited portions of the Whitman files in order to aid them in their research. I am also aware that during the same period President Eisenhower refused for various reasons to grant similar access to other persons.

23. On at least one occasion a member of the incumbent Kennedy Administration sought access to the Eisenhower files and was denied such access. On January 18, 1962, I received a telephone call from a staff member of the Office of International Security Affairs of the Department of Defense who explained that the State Department desired to reconstruct a portion of certain discussions between the United States and France concerning the Suez crisis in 1956. I replied to the staff member that it would be necessary for the incumbent administration to request such access to President Eisenhower's files from the President himself. To my knowledge no subsequent request was made and my father never instructed me to review the files to locate the information in question. At the time of this incident, I prepared a memorandum setting forth the substance of my conversation with his staff member. That memorandum is attached hereto as Exhibit B.

24. On another occasion, in approximately 1964, a request was made to provide President Johnson access to a letter sent from David Ben Gurian of Israel to President Eisenhower. That request was honored. Prior to his death, the highly secret materials which he no longer needed were transferred to Abilene.

25. Upon the death of President Eisenhower in 1969 all of the Whitman files which had been in his possession in Gettysburg since the close of the administration were packed and shipped to the Eisenhower Library in Abilene, Kansas. This transfer of custody was made under the same conditions with respect to access that had been imposed on the original shipment of staff and central office files sent to Kansas directly from the White House.

26. Since my father's death I have appointed an advisory committee known as the Eisenhower Manscript Committee to assist me in reference to the Eisenhower papers. This committee meets as required and communicates informally even more frequently concerning policy questions involving the imposition or relaxation of restrictions on public access to particular documents, segments of files or categories of materials. Although I have the authority to make the final determination of whether access to the Eisenhower Presidential materials should be restricted, the committee's recommendations are generally accepted and often reflect the suggestions of the library's professional staff. Recently approximately half of the so-called Whitman files have been opened to research. However, materials in these files that were classified or fell within the category of documents directed to remain under seal by the April 13, 1960 letter of intent remained sealed.

27. After leaving the White House and until his death, President Eisenhower used and treated his Presidential papers as his own personal property and at his death deeded them to the government in his will.

/s/John S. D. Eisenhower
JOHN S. D. EISENHOWER

Subscribed and sworn to before me this 30th day of June, 1975.

/s/Miriam T. [Illegible]
Notary Public

[SEAL]

Exhibit A

THE WHITE HOUSE
Washington

January 10, 1961

MEMORANDUM FOR

Lt. Col. John S. D. Eisenhower

Since you will be dealing with my papers in the near future, I would like you to accomplish the task for me of regrading all Memoranda of Conference in which I have participated to PRIVILEGED rather than the security classifications which they now bear.

/s/D. E.

Exhibit B

January 18, 1963

MEMORANDUM FOR THE RECORD:

Mr. The Stanley, formerly of the White House Staff, and now an official in the International Security Affairs of

the Department of Defense, called this afternoon requesting an opportunity to check into the files of former President Eisenhower.

Apparently there is a search going on between Secretary Dillon, Mr. Nitze and members of the State Department to ascertain some facts (which Mr. Stanley could not give over the phone) pertaining to our discussions with the French at the time of the Suez crisis in 1956. I received the impression that the issue applied to a possible United States response to Khrushchev's threats to use "rockets" if the Suez operations were continued.

Apparently the French are currently making use of alleged inconsistencies in the U.S. position at that time in discussions now being held with the State Department. Secretary Dillon, who was Ambassador to France at the time in question, recalls a certain U.S. position which he represented to the French government, the French, on the other hand, claim that Ambassador Alphand in Washington received a different impression from the U.S. State Department. Mr. Dillon recalls writing a memorandum on the subject but such memorandum is not to be found in the State Department files or in the Dulles papers. Mr. Stanley's request is to make a check of President Eisenhower's files to ascertain whether they may be here. He did not, of course, insist on doing it himself and would be delighted for us to do it for him.

I explained to Mr. Stanley that had this request been made while President Eisenhower was still in office, such an arrangement would be easy. However, upon his leaving the Presidency and being succeeded by a new administration of different political persuasion, it is now necessary as a matter of principle to restrict access to the files to those to whom President Eisenhower gives personal permission to check. I indicated somewhat directly to Mr.

Stanley that the channel for this permission should not go from him as a junior staff officer to me as another. As procedure I suggested that if the issue is one which truly involves national security (which seems highly doubtful) then Secretary McNamara should feel free to telephone President Eisenhower in Palm Desert, California and obtain permission to send a representative to see him to explain exactly the nature of his request. If such request appears legitimate, then President Eisenhower would instruct me to do the required research within the files. Mr. Stanley thought this procedure would be feasible since the item in question is not a "crash" item with respect to time.

I then telephoned President Eisenhower in California at 5 P.M., EST, and advised what had been done. I alerted him that he might be receiving a phone call from Secretary McNamara, although I doubted seriously such would occur. President Eisenhower agreed completely, and expressed some surprise that any agency of the government would attempt to obtain permission to get into his papers through such an indirect approach. I explained that this had been a personal idea of Mr. Stanley's, based on our former association in the White House, and that Mr. Stanley had merely overlooked the requirement for protection of Presidential papers.

John S. D. Eisenhower

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM J. HOPKINS

County of Montgomery :
: ss.:
State of Maryland :

WILLIAM J. HOPKINS, being duly sworn under oath, hereby deposes and says the following:

1. I am a resident of the State of Maryland and 65 years old. Until 1971, I was employed by the United States Government in various positions, beginning with the Department of Labor in 1929. In October of 1931, I was detailed to the Correspondence Section of the White House Office where I held various positions, including Assistant Chief of Correspondence. In 1943, I was appointed Junior Executive Clerk of the White House, the second highest Civil Service position in the White House Office. In 1948, I became the Senior Executive Clerk, a position I held until my retirement in 1971. This office, under the general administrative direction of the President and his staff, assists in providing for the orderly handling of documents and correspondence within the White House Office and in the organization and supervision of clerical and administrative services. President Johnson, perhaps in recognition of the contribution made throughout Government by civil servants and to the operation of the White House Office by its clerical staff, changed my title to Executive Assistant to the President; my duties, however, remained substantially unchanged.

2. The White House Office serves the President in the performance of the many detailed activities incident to his *immediate* office. It has served each of our Presidents in that capacity. With the creation of the Executive Office of the President (a so-called "umbrella" agency) in

1939 the White House Office became a division of that office, but remained a separate entity with its own clerical staff, its own budget, its own files, etc. In the past it has not served as an office of record. The Executive Office is comprised of such additional entities as for example the Office of Management and Budget, the Council of Economic Advisors, and the National Security Council. Each of these other entities is an office of record and maintains its own clerical staff, has its own appropriation and its own filing system, and is not serviced directly by the White House Office.

3. The Correspondence Section of The White House Office, in which I was employed between 1931 and 1943, was then and is now charged with several duties. If requested, correspondence section employees take dictation from members of the President's staff and from the President himself and assist in the preparation of correspondence generated in the White House. For example, President Roosevelt after a trip abroad during World War II wished to send personal letters to the families of American soldiers buried in a cemetery he visited; this task was handled by the Correspondence Section. I recall personally taking dictation from Presidents Hoover and Roosevelt, usually for correspondence or directional memoranda to members of his staff. Another important duty of the Correspondence Section is to type speech drafts and, in final form, official documents of public record such as Executive Orders, Executive Proclamations, and Presidential Messages to Congress. Finally, the Section's major function is to handle the miscellaneous correspondence of the President and his staff. As mail is received in the White House Mail Room, it is directed, according to its content and addressee, to the President or members of his staff, to the White House Executive Clerk, or to the various executive

agencies. A great mass of incoming mail cannot be directed specifically to one of these entities because it deals with more general matters, offering general criticisms or congratulations to the President, expressing viewpoints on various matters which do not concern a particular office or agency, etc. The Correspondence Section prepares suggested replies in form for signature to a vast percentage of the miscellaneous Presidential mail forwarded to the Section for action. These suggested responses are forwarded to the appropriate member of the staff for approval and, if approved, for his signature.

4. The type of correspondence received by the White House Office includes by way of example congratulatory letters, views and suggestions on topical issues, requests for jobs, autographs or pictures, complaints about the actions of a federal agency, letters recommending applicants for federal service, and letters written by special interest groups requesting or recommending specific action on certain issues. They cover the entire panorama of Government. This correspondence may be addressed to the President, the President's staff, or simply to the White House. The vast majority is addressed to the President. Correspondence volume increased greatly over the years I served in the White House. The first major increase occurred in the Roosevelt Administration, caused by public reaction to the Depression, to President Roosevelt's fire-side chats, and generally to the increased role of government in American life; the type and content of correspondence, however, has not changed significantly over the years except as affected by current events.

5. From 1943 to 1971, my responsibilities included supervision of the operating units of the White House Office. As Junior Executive Clerk I reported directly to the Senior Executive Clerk; as Senior Executive Clerk, I

was under the general administrative direction of the President and his staff. Operating units of the White House Office, over which I had responsibility, were the Correspondence Section, described above, the File Room, Mail Room, Records Office, Telephone Service, Telegraph and Travel Service, Administrative Office, and Messenger and Miscellaneous Services.

6. The Records Office maintains a card record of categories of official Presidential actions. In the area of Presidential appointments this file dates from approximately 1913; the records of other Presidential actions may or may not date back to 1913, but, so far as I recall, 1913 is the earliest date for any card record in the Records Office. This file is the only permanent record in the White House of Presidential actions. It is not a "best-evidence" file, however. The White House has never been considered an office of record. The originals of official actions of the President, functioning in his constitutional or statutory role, are customarily preserved by records elsewhere. For example, an enrolled bill signed by the President into law is filed with and maintained in the National Archives. Presidential vetos or messages to Congress are lodged with the Clerk of the House and/or Secretary of the Senate. Presidential pardons are filed with the Department of Justice. Original documents of an official act by the President are not retained by the White House. The record index, however, kept by the Records Office does record the fact of the actions taken. The index consists of cards which set forth only the events; the file does not include any supporting documents evidencing the particular Presidential action. Supporting files if they exist are sent on a current basis to the Central File Room with the exception of enrolled bill files which are retained in the Records Office until the close of an Administration. The central files and enrolled bill files are

packaged and sent to the departing President or to a place of his choice at the end of his Administration. The original of the executive orders and proclamations is sent to the National Archives at the time of promulgation. Another function of the Records Office is to assure, through research of the statutes, that prospective Presidential appointees are eligible under the statute. Files developed and maintained in connection with appointments by the President are also packaged and taken by the President at the end of his Administration.

7. The Administrative Office (officially known as Accounts, Purchases, Personnel, etc.) carries out such functions as this title implies. Numerous files developed and maintained by the Administrative Office are preserved by that office during successive Administrations; they are not taken from the White House by the retiring President.

8. At the end of each Presidential Administration under which I served, all of the files maintained by the Central File Room, as well as those maintained separately by the President's staff and his personal secretary, were packaged and shipped to a designated location selected by the retiring President or his representatives. The only files which remained for the incoming Administration were the files of the Administrative Office, the card file in the Records Office, and a small "precedent file" maintained in Central Files. This precedent file is quite small in volume, approximately four file cases. It began approximately 100 years ago and is most incomplete. In the main it consists in more recent years of copies of documents which, because of their unusual nature, the clerk's office determined would be of precedential value if the situation were to arise in the future. For example, when statehood was granted to Hawaii and Alaska, configuration of the American Flag had to be altered. It

is my recollection that we developed a precedent file relating how this matter was handled so that future Administrations would have a guide if another state were to be admitted at a later time. In such instances, however, only copies of documents are customarily used for the precedent files. Of course, nothing of a political or personal nature is maintained in the precedent file. The source document is considered a Presidential paper and is included with the files taken by the President at the time he leaves office.

9. When I first joined the White House Office in 1931, under President Hoover, the size of the staff was approximately 100 persons, half of whom were detailed from the Departments and Agencies. Today the White House Office staff numbers approximately five hundred. The Central File Room in 1931 was accordingly a small room located in the west wing of the White House. Its staff consisted, as I recall, of six persons. The filing system at that time was bifurcated, consisting of the alphabetical file and the President's Personal File (PPF). I was informed at the time (1931) that this system had been in effect at least since the Administration of Theodore Roosevelt and probably longer. Important letters or documents sent to Central Files were included in the PPF (or official) file. Copies thereof, or less important documents, were cross-referenced in the alphabetical file which was comprised in large degree of correspondence from the general public. At the end of each Administration, up to and including the Hoover Administration, I was told the alphabetical file was destroyed. The PPF file, on the other hand, consisting of the official, political and other personal materials of the President, was packaged and sent to a location designated by the outgoing President. Since and including the Franklin D. Roosevelt Administration, with the advent of

the innovative Presidential Library System, both categories of files have been retained and turned over to the outgoing President.

10. I recall that the practice of each President taking with him his files and materials accumulated in the White House during his term in office came as a surprise to the members of each incoming Administration. However, the files of a President and his staff reflect his actions taken, not only as the Chief Executive, but also as the Head of his party, as an individual politician, as a leader in world affairs, and as a private citizen. The materials reflecting each of these roles become comingled in the White House file; there is no segregation of personal, political and Presidential papers. Nor can there be successfully, because of the comingling of subjects in individual documents. Consequently, by the close of each Administration, members of the outgoing President's staff seemed to understand quite well the necessity for removal of all Presidential materials and to actively support the continuation of a practice in being since the time of George Washington, which they had earlier questioned.

11. Because of the death of President Roosevelt during his term in office, the packing and shipping of his files was less well prepared than during the changeover from President Hoover to President Roosevelt. President Roosevelt had already shipped to Hyde Park for storage some of his files which had become inactive. All of the files that remained in Central Files were packed in large boxes and sent to the National Archives within 72 hours of President Roosevelt's death. Nothing was left in Central Files except the small precedent file. The incoming mail which had not yet been acknowledged at the time of President Roosevelt's death was left unanswered, boxed for transfer to the National Archives, and for subsequent forwarding to Hyde Park. Although

President Roosevelt's material was in the Archives building temporarily, access to it was controlled by President Roosevelt's Private Secretary, Grace Tully, and later by a committee consisting of Grace Tully, Judge Samuel Rosenman, and others whom I do not presently recall.

12. President Roosevelt, like all other Presidents, maintained his own personal file which was not comingled with the files in Central Files. Grace Tully had responsibility for and control over access to this file, which consisted of materials more political or more sensitive than the materials normally sent to Central Files. Upon President Roosevelt's death, this file was sent to the Archives as well, where Miss Tully, having sole control over access, personally worked with the file for several months before its eventual transfer to the Roosevelt Library in Hyde Park.

13. The files of President Roosevelt's staff that were not maintained in Central Files were also packed and sent to the National Archives Building with the rest of the Presidential materials at the time of Roosevelt's death. Because of the abrupt change of Administrations, some of the staff members worked in the White House on President Truman's staff for an interim period, and maintained those materials in their files which were active at the time of the changeover. Shortly, however, even those materials were forwarded for inclusion among President Roosevelt's materials.

14. At the end of the Truman Administration, approximately 1600 file drawers of Presidential materials were shipped to Missouri at President Truman's request. We used old file cases found in the attic of the Old Soldier's Home in Washington, D.C. to package and ship these materials to Kansas City. President Truman's personal file

(which included daily summaries sent to President Truman from the National Security Council) were sent to a bank building in Kansas City where they were organized and maintained by President Truman's secretary, Rose Conway. It is my understanding that President Truman maintained control over this category of his files until his death.

15. The bifurcated alphabetical and PPF filing system was changed in time for the inauguration of the Kennedy Administration. The system was reorganized according to recommendations made by a study group appointed by Wayne Grover, then Archivist of the United States. The increased volume of Presidential materials, both generated and received by the White House, required reorganization. The present filing system is tailored specifically to the needs of the White House Office; to my knowledge there is no filing system similar to it in the Federal Government.

16. At the end of the Eisenhower Administration, the same procedure for packing and shipping the Presidential materials was used. As with the Hoover, Roosevelt, and Truman Administration, all of the materials in Central Files, the support files maintained in the Records Office, the files maintained separately by the President's staff, and the President's personal file maintained by his Private Secretary, Ann Whitman, were boxed and shipped to locations specified by President Eisenhower. Certain files were sent to Gettysburg, Pennsylvania where President Eisenhower personally worked with them. These Gettysburg materials included his personal file, popularly referred to as the "Whitman Files." Of course, the size of each President's personal file depended upon that President's method of operation. Most Presidents, for example, retained their own handwritten drafts or documents in their personal file; on the

other hand, I recall seeing in Central Files documents with a President's handwritten notations on it.

17. President Eisenhower's files, other than those sent to Gettysburg, were sent to Abilene, Kansas. Sensitive materials dealing largely with national security were sent to another secure location.

18. As with all other Presidents, President Eisenhower's staff was directed to pack and ship their files with the bulk of the Presidential materials. John Eisenhower, President Eisenhower's son, who was then a member of the President's staff, was instrumental in explaining to the Presidential staff which materials were to be boxed and shipped for the President.

19. When President Johnson succeeded to the Presidency there had been no opportunity for advance planning regarding disposition of President Kennedy's files. Many of President Kennedy's staff continued on for the time being as members of President Johnson's staff. Contrary to the rather immediate action in removing the files at the time of President Roosevelt's death, it was deemed necessary to retain most of President Kennedy's files at the White House for the time being for use by the Staff. In order to insure during this interim period that President Kennedy's files be kept inviolable with no comingling, at the direction of McGeorge Bundy, (a member of President Kennedy's staff who remained on with President Johnson for a time) I prepared a memorandum providing instructions to the staff on the handling of the files during the period when the files of both Presidents were active within the White House Office. A copy of the memorandum is attached to this Affidavit as Exhibit A. This dual operation worked itself out in a matter of months and eventually all of President Kennedy's files were removed from the White House Office in accordance with the pattern of his predecessors.

20. President Johnson was very much concerned with the preservation of his Presidential materials. I can recall instances in which he discussed with me and others concerning this matter. I recall one conversation in which President Johnson stated in effect that when a staff member comes aboard he comes with his hat in his hand and he should leave the same way. As a result of President Johnson's concern, frequent efforts were made to contact all staff members to advise them as to the separation of Presidential from their own personal materials; a memorandum providing guidelines for this separation was attempted but never distributed.

21. The transition from President Johnson to President Nixon was similar to all other transitions with respect to the files. A team from the General Services Administration assisted in the advance planning. All Presidential materials in the Central Files, supporting files in the Records Office, staff files, and President Johnson's personal files, were packed and shipped to the Johnson Library in Austin, Texas, at the direction of President Johnson.

22. It was my experience while Senior Executive Clerk that very infrequently would a member of any incumbent Administration need access to Presidential materials of a prior Administration. In those few instances in which this occurred, which I can only generally recall, my office would serve on occasion as intermediary conveying a request to the person controlling access to the prior President's file. If in my opinion, or in the opinion of others in my office, a request involved access to an essentially political document or in some other manner did not represent a legitimate request for necessary documents, my office would suggest to the person seeking the material that if they wished to pursue

the matter they contact the former President's representative directly.

/s/William J. Hopkins
WILLIAM J. HOPKINS

Subscribed and sworn to
before me this 30th day
of June, 1975.

/s/Helen L. Benson
Notary Public

My Commission Expires:
July 1, 1978

EXHIBIT A

THE WHITE HOUSE
Washington

November 29, 1963

MEMORANDUM FOR THE WHITE HOUSE STAFF:

By custom and tradition, the files of the White House Office belong to the President in whose Administration they are accumulated. It has been the invariable practice, at the end of an Administration, for the outgoing President or his estate to authorize the depository or disposition to be made of such files.

President Taft in his book "Our Chief Magistrate and his Powers," made the following reference to this practice:

> "The . . . office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the Government, unless it goes on to the

official files of the Department to which it may be addressed. The retiring President takes with him all the correspondence, original and copies, which he carried on during his Administration. . . ."

In the interest of continuing this practice the President has directed that, so long as President Kennedy's files remain in the White House Office, there is to be no intermingling of the files of the two Administrations. This applies of course both to the Central Files and the files in the offices of the various members of the staff.

Papers of the White House Office at the time of President Kennedy's death as well as those enroute at that time and intended for him shall be considered as belonging to the Kennedy Administration files. Any papers relating to President Kennedy's funeral are also to be included in this category.

All other papers now accumulating in the White House Office will constitute a new set of files for President Johnson.

/s/William J. Hopkins
William J. Hopkins
Executive Clerk

EXHIBIT D

[Caption Omitted in Printing]

AFFIDAVIT OF RAYMOND G. LARROCA

City of Washington :
: ss.:
District of Columbia :

RAYMOND G. LARROCA, being duly sworn, deposes and says as follows:

1. I am a resident of Washington, D. C. and an attorney admitted to practice before the Supreme Court of the United States and the federal and local courts in the District of Columbia.

2. I have in the past and do now presently represent former President Richard Nixon.

3. In the course of said representation, I have been required to determine the existence of, locate, and review certain tape recorded conversations between then President Nixon and his aides, or others, in the Oval Office, in the Executive Office Building, and on telephones serving not only those offices but also his residence.

4. Based upon my experiences in accomplishing the review of these tape recorded conversations, I can state that,

(a) The conversations which occurred in the Oval Office are at times recorded on a single reel of tape which spans more than one day (and sometimes more than two days), while at other times, a single day's conversations may extend over more than one tape reel.

(b) Recorded conversations that occurred in the President's office in the Executive Office Building during the same day may appear on separate tape reels but not sequentially; while conversations occurring on different days may appear on the same reel, but again not sequentially.

(c) There is to my knowledge no known effective topical index to the tape recorded conversations.

(d) The only partial guide for the location and review of the recorded conversations that is known to me is President Nixon's daily diary which attempts to indicate the physical loca-

tion of the President during the day and to identify the persons who were with him. In a very small number of instances, primarily during the first portion of the Nixon Administration, the diary may indicate by general description the subject matter of a meeting, but in such instances the actual recorded conversation may not and often is not limited to the indicated subject. Additionally, I have found the President's diaries to be often incomplete or inaccurate as to the identification of the persons whose conversations with the President are actually recorded.

(e) The President's diaries do not reflect the recordation of personal exchanges and conversations of the President with members of his personal staff, his secretary, members of his family, and others.

(f) The actual conversations recorded on the White House tapes deal with constantly changing topics, shifting back and forth between what might be described as matters relating to the President's official duties, his political activities and his personal affairs. This variety of subjects often alternate or recur even within a single conversation segment with a particular individual or individuals. I recall reviewing very few conversations that were not interspersed with such unrelated and disparate matters.

(g) In order to locate particular conversations or to locate, identify or segregate particular topics or categories of topics within a given conversation or period of time, it is necessary to listen to several tapes in their entirety. This is because there is no announcement of the speakers on the tapes themselves, and it is initially necessary to establish a time reference, then to

identify individual speakers and/or subjects. For me even to accomplish the purpose of my limited review, I was required to listen to very substantial portions of unrelated conversations, including purely personal and/or political matters before I could locate conversations or segments thereof relevant to the subject of my review.

(h) Based upon my experience in reviewing the White House recordings of the conversations of former President Nixon, it is my opinion that in order for any person or persons to determine what in any such recording relates to any particular subject, or what part of a recording reel contains particular conversations or categories of conversations, that person would have no alternative but to review entire tape reels and that such review to locate, identify, segregate and categorize the conversations would entail the review of innumerable matters of private conversations.

5. In the course of representing former President Nixon, various requests for access to his presidential materials have been brought to my attention. I personally know, or have been informed of, demands for access by committees of the United States Congress, government agencies, commissions, and entities, and other persons in their private or business capacities.

6. Demands for the production of Mr. Nixon's presidential materials by committees of the United States Congress and Members thereof are as follows:

(a) Representative John E. Moss, Chairman of the Oversight and Investigative Subcommittee of the House Committee on Interstate and Foreign Commerce, by letter on May 6, 1975, requested transcripts of any conversations

recorded in the White House between September 1, 1970, and October 1, 1971, which involve officials of Ford Motor Corporation or Chrysler Corporation and which pertain to the implementation by the Department of Transportation of safety belt or airbag standards.

(b) Representative Bella S. Abzug, by letter of May 15, 1975, requested access to President Nixon's correspondence with then-Prime Minister Heath of England and then-President Pompidou of France which she believed pertained to White House support for the Anglo-French Concorde supersonic transport.

(c) Representative John D. Dingell, Chairman Subcommittee on Activities of Regulatory Agencies of the House Select Committee on Small Business, by letter on January 15, 1975, requested access to certain presidential materials of the Nixon Administration relating to Executive Order 11451 which in January, 1969 established the Commission on Personnel Interchange.

(d) The Joint Committee on Internal Revenue Taxation, by letter of March 13, 1975, requested documents which included records and memoranda allegedly relating to the use of the Internal Revenue Service for political purposes.

(e) Senator Frank Church, Chairman, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, requested access to certain records generated during former President Nixon's term believed by the Committee to be relevant to its inquiry as authorized by S. Res. 21.

7. Demands that have been made for access to former President Nixon's presidential materials by various governmental agencies, commissions, and other entities are as follows:

(a) William J. Guste, Jr., Attorney General of Louisiana, by letter dated May 21, 1975, requested transcripts of taped discussions between H. R. Haldeman and former President Nixon during October or November, 1971, relating to the banning of the pesticide DDT.

(b) Phillip E. Areeda, Counsel to President Ford, on September 25, 1974, requested access to the tape of a conversation between former President Nixon and Richard Moore on April 19, 1973, regarding references pertaining to then-Governor Nelson Rockefeller.

(c) David Belin, Executive Director of the Commission on CIA Activities, by letter of April 22, 1975, requested access to all materials relevant to the conversation between Richard Helms and then President Nixon on October 8, 1971, as well as all materials relating to requests for assistance and support directed by President Nixon and members of the White House staff to the CIA pertaining to matters other than foreign intelligence.

8. Other requests for access to the presidential materials of the Nixon Administration include the following:

(a) Brit Hume, ABC News, by letter on January 24, 1975, requested copies of four documents described in an affidavit of J. Fred Buzhardt, former Special Counsel to the President, filed on October 9, 1973, in *Center on Corporate Responsibility, Inc. v. Shultz,* C.A. No. 73-846 (D.D.C.).

(b) Bob Woodward and Carl Berstein, *The Washington Post,* on October 22, 1974, requested access to daily logs, schedules, lists of telephone calls, schedules of visitors, and lists of the President's travel companions during the period from April 25, 1974 to August 9, 1974.

9. Litigation in which I am aware or am informed that there have been attempts to gain access to presidential materials of the Nixon Administration include the following:

(a) *Halperin v. Kissinger,* C.A. No. 73-1187, D.C.D.C. Plaintiff in this action has subpoenaed presidential materials relating to the interception of telephonic communications by electronic surveillance.

(b) *Hellman v. Sampson,* C.A. No. 74-1551 D.C.D.C. A group of playwrights, film makers, writers, and lawyers seek disclosure of 147 tape recordings of presidential conversations.

(c) *Reporters Committee for Freedom of the Press v. Sampson,* C.A. No. 74-1533, D.C.D.C. Several groups and individuals representing historians, reporters and others seek access to all of the former President's papers and materials under the Freedom of Information Act.

(d) *Oliver v. Committee for the Re-Election of the President,* C.A. No. 1207-73, D.C.D.C. Plaintiff in this case seeks, without limitation, production of White House tape recordings covering several months.

(e) *Democratic National Committee v. McCord,* C.A. No. 1233-72, D.C.D.C. Defendant McCord seeks access to tapes of certain presidential conversations.

(f) *Sun Oil Co. v. United States,* No. 806-71, U.S. Ct. of Claims. Plaintiffs seek discovery of four documents containing or reflecting communications with or between former President Nixon and his advisors.

(g) *United States v. National Broadcasting Co.,* C.A. No. 72-819-RJK; *United States v. Columbia Broadcasting System,* C.A. No. 72-820-RJK; *United States v. American Broadcasting Co.,* C.A. No. 72-821-RJK, United States District Court for the Central District of California. The three defendant networks sought discovery of presidential documents by a Federal Rules of Civil Procedure Rule 34 request.

(h) *Dellums v. Powell,* C.A. No. 2271-71, D.C.D.C. Plaintiffs subpoenaed tape recordings of presidential conversations of May 1 to May 5, 1971.

(i) *Apton v. Wilson,* C.A. No. 798-72; *Kuhn v. Wilson,* C.A. No. 956-71, D.C. D.C. Parties in these consolidated actions, by subpoena, sought access to presidential conversations occurring between March 1 and May 31, 1971.

(j) *Rothblatt v. Nixon,* C.A. No. 74-1080, D.C.D.C. The Plaintiff made a Rule 34 request for all tapes relating to the payment of legal fees to defendants in Watergate related actions.

(k) *United States v. Means,* Crim. No. 73-5035; *United States v. Banks,* Crim. No. 73-5034, D.C.S.D. The defendants in these cases subpoenaed tapes relating to the events at Wounded Knee.

/s/Raymond G. Larroca
RAYMOND G. LARROCA

Subscribed and sworn to
before me this 30th
day of June, 1975.

/s/Sandra M. Martin
Notary Public

My Commission Expires:
April 30, 1979

EXHIBIT E

DESCRIPTION OF THE WHITE HOUSE TAPING SYSTEM

During the term of Richard M. Nixon as President of the United States, three tape recording systems (the "systems") were installed for the purpose of recording the President's conversations. The three were located: (1) in the President's Oval Office of the White [House], and his office in the Executive Office Building ("EOB"); (2) in the President's study in the Aspen Lodge at Camp David; and (3) on the telephones serving the Oval Office, the EOB office, the Lincoln Sitting Room of the White House residence, and the study at Camp David.

Each of the systems was installed under the supervision of the Technical Security Division of the United States Secret Service. The system serving the Oval Office and the EOB office (the "office system") was installed in February, 1971 and was disconnected on July 18, 1973. The system serving the Aspen Lodge study and telephone (the "Camp David system") was installed in February or March, 1972 and was disconnected on July 18, 1973. The system serving the telephones in the Oval Office, EOB Office and Lincoln Sitting Room (the "telephone system") was installed in February, 1971, and was disconnected on July 18, 1973.

The telephone system was designed to record on a single recording machine all conversations that occurred on any of the telephones served by the system. The telephone taping mechanism was activated by a voltage control relay. When the receiver on any one of the three telephone extensions was lifted, recording commenced. The recording was deactivated by the voltage control relay when the receiver was replaced on its cradle.

The office system was designed to record conversations in the Oval Office and the EOB office on separate recording machines, each working on a voice operated relay so that recording began when activated by a voice or noise.

Each recording machine utilized five inch tape reels containing 1,800 feet of tape. The recording speed was 15/16ths inch per second. A single five-inch reel would be used to record approximately six hours of conversation.

At such time as a tape reel was fully recorded, it was rewound, removed, placed in a storage box, dated, identified as "telephone", "EOB", or "Oval Office", and placed first in a cabinet where the recording equipment was stored and subsequently put in a safe.

The system was designed to, and, so long as the tape reel was replaced when required, did in fact record all conversations that occurred in the offices in which the system was installed and on the telephones covered by the system. There was no manual override device by which the recording equipment could be deactivated from within any of the offices.

The Technical Security Division of the U.S. Secret Service supervised the operation of the systems and retained custody over all tape recorded reels until July 18, 1973, at which time the system was deactivated and custody transferred to the Office of the President.

The tape recorded reels containing the conversations recorded during the period in which the systems were installed are presently stored in the EOB in a locked and alarmed room, the security of which is maintained by the U.S. Secret Service. The custodian of the recorded tape reels is Mr. Philip W. Buchen, Counsel to President Ford, and his agents.

EXHIBIT F

THE WHITE HOUSE

TEXT OF A LEGAL OPINION
BY THE ATTORNEY GENERAL

September 6, 1974

The President
The White House.
Dear Mr. President:

You have requested my opinion concerning papers and other historical materials retained by the White House Office during the administration of former President Richard M. Nixon and now in the possession of the United States or its officials. Some such materials were left in the Executive Office Building or in the White House at the time of former President Nixon's departure; others had previously been deposited with the Administrator of General Services. You have inquired concerning the ownership of such materials and the obligations of the Government with respect to subpoenas and court orders addressed to the United States or its officials pertaining to them.

To conclude that such materials are not the property of former President Nixon would be to reverse what has

apparently been the almost unvaried understanding of all three branches of the Government since the beginning of the Republic, and to call into question the practices of our Presidents since the earliest times. In *Folsom v. Marsh*, 9 F. Cas. 342 (No. 4901), 2 Story 100, 108-109 (C.C.D. Mass, 1841), Mr. Justice Story, while sitting in circuit, found that President Washington's letters, including his official correspondence,[1] were his private property which he could bequeath, which his estate could alienate, and in which the purchaser could acquire a copyright. According to testimony of the Archivist of the United States in 1955, every President of the United States beginning with George Washington regarded all the papers and historical materials which accumulated in the White House during his administration, whether of a private or official nature, as his own property.[2] A classic

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[1]The official documents involved in the case were:

Letters addressed by Washington, as commander-in-chief, to the President of Congress.

Official letters to governors of States and speakers of legislative bodies.

Circular letters.

General orders.

Communications (official) addressed as President to his Cabinet.

Letter accepting the command of the army, on our expected war with France. 2 Story at 104-105.

The clear holding on the property point (*Id.* at 108-09) is arguably converted to dictum by Justice Story's later indication, in connection with another issue, that copyright violation with respect to the official documents did not have to be established in order to maintain the suit. (*Id.* at 114).

[2]Statement of Dr. Wayne C. Grover, Archivist of the United States, during the House Hearings on the Joint Resolution of August 12, 1955, 69 Stat. 695, *To provide for the acceptance and maintenance of Presidential libraries, and for other purposes* (now

[footnote continued]

exposition of this Presidential view was set forth by President Taft in a lecture presented several years after he had left the White House:

> The office of the President is not a recording office. The vast amount of correspondence that goes through it, signed either by the President or his secretaries, does not become the property or a record of the government unless it goes on to the official files of the department to which it may be addressed. The President takes with him all the correspondence, original and copies, carried on during his administration. Taft, *The Presidency* 30-31 (1916).

Past Congressional recognition of the President's title is evidenced by the various statutes providing for Government purchase of the official and private papers of many of our early Presidents, including Washington, Jefferson, Madison, Monroe and Jackson. *See* 1955 Hearings at 28, 39-42.

Even if there were no recent statutory sanction of Presidential ownership, a consistent history such as that described above might well be determinative. As the Supreme Court said in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915):

> [G]overnment is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have

codified in 44 U.S.C. 2101, 2107 and 2108; hereinafter referred to as the "Presidential Libraries Act"), Hearing before a Special Subcommittee of the Committee on Government Operations, House of Representatives, 84th Cong., 1st Sess., on H.J. Res. 330, H.J. Res. 331, and H.J. Res. 332 (hereafter referred to as "1955 Hearings"), pp. 28, 45.

> been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation. *Id.* at 472-73.
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> * * *
>
> [W]hile no . . . express authority has been granted [by Congress], there is nothing in the nature of the power exercised which prevents Congress from granting it by implication just as could be done by any other owner of property under similar conditions. *Id.* at 474.

Moreover, with respect to the practice at issue here, there is recent statutory sanction. The 1955 Presidential Libraries Act, which serves as the permanent basis of the Presidential Library system, constitutes clear legislative acknowledgement that a President has title to all the documents and historical materials—whether personal or official—which accumulate in the White House Office during his incumbency. The Federal Records Act of 1950, 64 Stat. 587, which was the predecessor of the Presidential Libraries Act, authorized the Administrator of General Services to accept for deposit "the personal papers and other personal historical documentary materials of the present President of the United States." Section 507 (e), 64 Stat. 588. The word "personal" might have been read as intended to distinguish between the private and official papers of the President.[3] The

[3]Compare Section 507(e) with Section 507(a), dealing with the records of an agency. A memorandum prepared in the Office of the Assistant Solicitor General (now Office at Legal Counsel) on July 24, 1951 indicated that such a distinction between private and official Presidential papers would be inconsistent with historic

[footnote continued]

corresponding provision of the current law, however, 44 U.S.C. 2107 (1), avoids the ambiguity. It envisions the President's deposit of *all* Presidential materials, not only personal ones. During the House debate on the Presidential Libraries Act, Congressman Moss, who was in charge of the bill, expressly stated:

> Four. Finally, it should be remembered that Presidential papers belong to the President, and that they have increased tremendously in volume in the past 25 or 30 years. It is no longer possible for a President to take his papers home with him and care for them properly. It is no accident that the last three Presidents—Hoover, F.D. Roosevelt, and Harry Truman—have had to make special provisions through the means of the presidential library to take care of their papers. 101 Cong. Rec. 9935 (1935).

The legislative history of the Act reflects no disagreement with this position on the part of any member of the Congress. The hearings before a Special Subcommittee of the House Committee on Government Operations indicate congressional awareness of the Act's assumption that all Presidential papers are the private property of the President. 1955 Hearings at 12, 20, 28, 32, 52, 54, 58.

A recent discussion concerning ownership of Presidential materials appears in the report prepared by the staff of the Joint Committee on Internal Revenue Taxation involving the examination of President Nixon's tax returns. H. Rept. 93-966, 93d Cong., 2d Sess. (1974). The report points to the practice of Presidents since Washington of treating their papers, both private and official, as their personal property; and to the congres-

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precedents, and difficult if not impossible to maintain. It accordingly regarded the Records Act's use of the term "personal" as intended merely to exclude the permanent files of the Chief Executive Clerk discussed at page 12 below.

sional ratification of the practice in the 1955 library legislation. It concludes that "the historical precedents taken together with the provisions set forth in the Presidential Libraries Act, suggest that the papers of President Nixon are considered his personal property rather than public property." *Id.* at 28-29.

An apparent obstacle to Presidential ownership of all White House materials is Article II, section 1, clause 7 of the Constitution, which provides:

> "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."

But objection based upon this provision is circular in its reasoning, except insofar as it applies to the blank typing paper and materials upon which the Presidential records are inscribed. For the records themselves are given to the President as an "emolument" only if one assumes that they are not the property of the President from the very moment of their creation. As for the blank typing paper and materials, which are of course of negligible value, they can be regarded as consumables, like electricity or telephone service, provided for the conduct of Presidential business. In any event, the Constitutional provision can simply not be interpreted in such a fashion as to preclude the conferral of anything of value, beyond his salary, upon the President. An eminent authority on the subject states the following:

> As a matter of fact the President enjoys many more "emoluments" from the United States than the "compensation" which he receives "at stated times"—at least, what most people would reckon to be emoluments. Corwin, *The President* 348 N. 53.

He gives as examples of such additional emoluments provided by the Congress the use of personal secretaries and the right to reside in the White House. *Id.* at 348-49.

Another obstacle to Presidential ownership of the materials in question is their character as public documents, often secret and sometimes necessary for the continued operation of government. However, without speaking to the desirability of the established property rule (and there is pending in the Congress legislation which would apparently alter it—S. 2951, 93d Cong., 2d Sess., a bill "[t]o provide for public ownership of certain documents of elected public officials"), it must be conceded that accommodation of such concerns can be achieved whether or not ownership of the materials in question rests with the former President. Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. Thus, in *Folsom v. Marsh, supra,* Mr. Justice Story stated the following:

> In respect to official letters, addressed to the government, or any of its departments, by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful, whether any public officer is at liberty to publish them, at least, in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the

> government, to give them publicity, even against the will of the writers. 2 Story at 113.

That portion of the Criminal Code dealing with the transmission or loss of national security information, 18 U.S.C. §793, obviously applies to Presidential papers even when they are within the possession of the former President.[4] Upon the death of Franklin D. Roosevelt during the closing months of World War II, with full acceptance of the traditional view that all White House papers belonged to the President and devolved to his estate, some of the papers dealing with prosecution of the War (the so-called "Map Room Papers") were retained by President Truman under a theory of "protective custody" until December 1946 *Matter of Roosevelt,* 190 Misc. 341, 344, 73 N.Y.S. 821, 825 (Sur. Ct. 1947); *Eighth Annual Report of the Archivist of the United States as to the Franklin D. Roosevelt Library* (1947) p. 1. Thus, regardless of whether this is the best way to approach the problem, precedent demonstrates that the governmental interests arising because of the peculiar nature of these materials (notably, any need to protect national security information and any need for continued use of certain documents in the process of government) can be protected in full conformity with the theory of ownership on the part of the ex-President.

Because the principle of Presidential ownership of White House materials has been acknowledged by all three branches of the Government from the earliest times; because that principle does not violate any provision of the Constitution or contravene any existing statute; and because that principle is not inconsistent

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[4]Section 11 of Executive Order 11652 makes explicit provision for declassification of Presidential material that has been deposited in the Archives.

with adequate protection of the interests of the United States; I conclude that the papers and materials in question were the property of Richard M. Nixon when his term of office ended. Any inference that the former President abandoned his ownership of the materials he left in the White House and his Executive Office Building is eliminated by a memorandum to the White House staff from Jerry H. Jones, Special Assistant to President Nixon, dated the day of his resignation, asserting that "the files of the White House Office belong to the President in whose Administration they were accumulated," and setting forth instructions with respect to the treatment of such materials until they can be collected and disposed of according to the ex-President's wishes. We are advised that the materials previously deposited with the Administrator of General Services were likewise transmitted and received with the understanding of continuing Presidential ownership.

I must, however, exclude one category of documents from the scope of this opinion concerning ownership and advise you that their status cannot be definitively determined on the basis of presently available information. Although the fact is not recorded in the published materials we have examined, our inquiry indicates that at least in recent memory certain "permanent files" have been retained by the Chief Executive Clerk of the White House from administration to administration. These include White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action. Retention of these materials by the Chief Executive Clerk is of course not necessarily inconsistent with initial Presidential ownership. In light of the otherwise uniform

practice with respect to much more important official documents, relinquishment of these materials may reasonably be regarded as a voluntary act of courtesy on the part of the outgoing Chief Executive. I cannot, however, make an adequately informed judgment concerning these files without more extensive factual and historical inquiry which your need for this opinion does not permit. Of course, even if such inquiry should show that these particular documents have been regarded as Government property, that conclusion would not support a generalization of Government ownership with respect to the much more extensive other material covered by this opinion, as to which the Presidential practice and congressional acquiesence are clear.

As to the obligations of the Government with respect to subpoenas and court orders directed to the United States or its officials pertaining to the subject materials; Even though the Government is merely the custodian and not the owner, it can properly be subjected to court directives relating to the materials. The Federal Rules of Criminal Procedure authorize the courts, upon motion of a defendant, to order the Government to permit access to papers and other objects "which are within the possession, custody or control of the government. . . ." Fed. R. Crim. P. 16(b). A similar provision is applicable with regard to discovery in civil cases involving material within the "possession, custody or control" of a party (including the Government). Fed. R. Civ. P. 34(a). In addition, in both criminal and civil cases, a subpoena may be issued directing a person to produce documents or objects which are within his possession, but which belong to another person. Fed. R. Crim. P. 17(c); Fed. R. Civ. P. 45(b). *See, e.g., Couch v. United States,* 409 U.S. 322 (1973); *Schwimmer v. United States,* 232 F.2d 855, 860 (8th Cir., 1956), *cert. denied,* 352 U.S. 833: *United*

States v. Re, 313 F. Supp. 442, 449 (S.D.N.Y. 1970). I advise you, therefore, that items included within the subject materials properly subpoenaed from the Government or its officials must be produced; and that none of the materials can be removed or otherwise disposed of contrary to the provisions of any duly issued court order against the Government or its officials pertaining to them. Of course both the former President and the Government can seek modification of such subpoenas and orders, and can challenge their validity on Constitutional or other grounds.

Respectfully,

Attorney General

[Caption Omitted in Printing]

EVIDENTIARY SUBMISSION OF DEFENDANTS UNITED STATES AND ADMINISTRATOR OF GENERAL SERVICES

Pursuant to this Court's Order of June 13, 1975, defendants United States and Administrator of General Services hereby submit the following affidavits as their evidentiary presentation in this action:

1. Affidavit of Harry J. Middleton;

2. Affidavit of William R. Emerson executed on July 22, 1975;

3. Affidavit of William R. Emerson executed on July 23, 1975;

4. Affidavit of Jeanne Davis;

5. Affidavit of John Stewart;

6. Affidavit of Daniel J. Reed.

In addition, defendants intend to utilize the deposition of plaintiff Richard M. Nixon and the deposition of Jeanne W. Davis, which will be filed with the Court, as well as certain of the affidavits submitted by plaintiffs, various Stipulations, and documents attached thereto, which are being submitted by the parties, and various matters which are judicially noticeable.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

IRWIN GOLDBLOOM

DAVID J. ANDERSON

JEFFREY AXELRAD

JOHN T. BOESE
Attorneys, Department of Justice
Attorneys for Defendants
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Telephone: (202) 739-3446

[Caption Omitted in Printing]

AFFIDAVIT OF HARRY J. MIDDLETON,
DIRECTOR, LYNDON BAINES JOHNSON LIBRARY

CITY OF AUSTIN)
) ss:
STATE OF TEXAS)

HARRY J. MIDDLETON, being duly sworn, deposes and says:

1. I am Director of the Lyndon Baines Johnson Library ("the Library"), a unit of the National Archives and Records Service ("NARS") within the General Services Administration, located at The University of Texas in Austin, Texas. I was appointed to this position in May 1970 by James B. Rhoads, Archivist of the United States.

2. The seven professional archivists and five archives technicians who presently comprise the Library's archives staff were selected either by my predecessor, Dr. Chester Newland, or by myself. Of this group, the seven archivists—who review the papers in the Library's collections—have come to the Library through Civil Service channels. All but one have completed the requisite post-graduate course, either in the program administered by NARS or from graduate programs in archival practice located in various universities throughout the United States, including The University of Texas.

3. The terms of President Johnson's letter to the Administrator of General Services, August 13, 1965, contained the following provisions:

> (c) Archival personnel of the United States designated by the Administrator of General Services shall review the Materials to which this agreement applies and any Materials in the following categories shall be placed under seal of restriction:
>
> (i) Materials containing statements which may in any manner be used to injure, embarrass, or harass any person, or Materials which may in any manner be prejudicial to the conduct of foreign relations of the United States of America, or Materials containing statements made by or to me in confidence.
>
> (ii) Defense information that has been security classified pursuant to law to Executive order: *Provided that* such information may be declassified or otherwise made available in accordance with the procedures established by law or Executive order governing availability of security-classified information
>
> (iii) Papers relating to my family or private affairs, and papers relating to the families or private affairs of persons who have had correspondence with me.

4. In order to determine which documents are subject to these provisions, the archivists on the Library staff have been engaged in a detailed, page-by-page review of the materials in the collection. Thus, before a particular document is determined to be restricted, that document is read by at least one of the professional archivists on the Library's staff of archivists. As professionals, we treat such materials with absolute discretion, prudence and respect for the integrity of the privacy of the individual involved. We do not disclose

anything we have read of a private or personal nature in the course of our duties. The need to make judgments concerning such restrictions and to insure the confidentiality of the restricted material are situations confronted frequently by professional archivists in the Presidential Library system.

5. The review of non-classified materials relating to the period of the Johnson Presidency has been virtually completed. Of the approximately fifteen million pages of documents comprising these materials, less than one percent fell within the restricted categories. The remaining ninety-nine percent of the materials reviewed is now for all practical purposes open to public inspection. Approximately seventeen million pages of materials—one million of which are security classified Presidential papers, six million of which relate to the period prior to Mr. Johnson's Presidency, and ten million of which include papers donated by other persons and Federal Records—remain to be reviewed by the Library archivists.

6. In order to enable them properly to review and classify the materials in the collection, archivists on the Library staff have obtained the requisite security clearances needed for the performance of their duties. All of the members of the archives staff hold Top Secret clearances. Five members of the staff hold special clearances necessary to permit them to inspect materials more sensitive than those authorized to be seen by persons holding a Top Secret clearance.

7. Requests for access to classified materials were denied two members of the Department of State—Dr. G. M. Richardson Dougall and Dr. Edwin S. Costrell—in June 1974 because, although the two individuals had the requisite clearances for the material they wanted to see, that material had not at that time been reviewed for

access by our archivists. For the same reason, access to classified materials was denied to Lt. Col. Bruce Carpenter of 7602nd Air Intelligence Gp, Fort Belvoir, Va., in June 1974.

Access to certain classified materials requested by the U.S. Senate's Select Committee to study Governmental Operations with Respect to Intelligence Activities (the Church Commitee) was granted to a member of the staff of that Committee—Mr. Loch Johnson—in July 1975.

8. Requests for access to restricted materials in this Library have been received from the following Members of Congress:

- Senator William J. Fulbright, Chairman of the Senate Committee on Foreign Relations, June 14, 1972
- Senator Adlai Stevenson III, July 19 and 28, 1972

Copies of the correspondence pertaining to these requests are attached as Exhibits A, B, C, D, and E.

/s/Harry J. Middleton
Harry J. Middleton

Subscribed and Sworn to Before me
this 18th day of July, 1975.

/s/Janie S. Melton
Notary Public

EXHIBIT "A"

United States Senate
Committee on Foreign Relations
Washington, D.C. 20510

June 14, 1972

Mr. Harry Middleton
Director, Lyndon Baines
Johnson Library
Austin, Texas 78712

Dear Mr. Middleton:

As you may know, staff members of the Committee on Foreign Relations are examining American involvement in Indochina. In their studies they are using the documents and analyses of the "Pentagon Papers" as well as other relevant sources.

The Pentagon Papers have proved to be a valuable source of information but unfortunately they contain few documents relating to Vietnam policy in the Johnson Administration. I would appreciate the Library furnishing Committee researchers with documents in the possession of the LBJ Library which relate to this period and which might be useful to their studies. In particular, the Committee researchers would like to have access to the papers analyzing the major military and foreign policy decisions of the Johnson Administration concerning Vietnam and supporting documentation compiled in the Administration's last months.

It has been called to my attention that among other studies, the State Department and White House staff prepared thoroughly documented studies on the 1964 Tonkin Gulf crisis and the Administration's decision to

send large forces to Vietnam. The Committee would appreciate receiving these also.

Since some of these documents and analyses are still sensitive, our staff people, who are cleared for Top Secret work through the Department of Defense, will naturally accord them the respect due sensitive documents.

Sincerely yours,

/s/J. W. Fulbright
J. W. Fulbright
Chairman

EXHIBIT "B"

July 5, 1972

Dear Mr. Chairman:

I am writing in response to your letter of June 14. Your request in this regard is understandable, as are a large number of similar requests which we have received. However, I must give you the same reply I have given to the others, which is that we cannot accede to the request at this time.

The task of organizing, reviewing and making available for research the 31 million papers in the Library's collections is an enormous undertaking. The size of the task required, early in the Library's operation, that we establish a set of priorities for staff work and determine a schedule for opening the documents.

This was similar to the needs that other Presidential Libraries before us had recognized, and our conclusions were consistent with the ones arrived at by those

institutions: We decided to concentrate first on processing and organizing the papers which could be opened most quickly—the papers concerned with domestic policy. This process has begun—we opened our first group of papers, those on Education, earlier this year—and it will continue over the next several years.

As soon as it is practical and feasible, we will move into the area of organizing and readying for review the materials relating to foreign relations. Those materials, however, present problems of substantial complications, because of the classification of many of the documents by different agencies and departments of government; because of their sensitivity; and because of their bearing on present U.S. relations with other countries.

In view of these circumstances, and following the procedures established in other Presidential Libraries, President Johnson, the Archivist of the United States, and I are agreed that even after the task of organizing the foreign policy papers is completed, the Library cannot be the sole determiner of when those papers will be made available. That determination must be made in close consultation with those agencies of government having primary responsiblity for the conduct of the Nation's defense and foreign affairs, and with consideration for the status of our continuing relationships with other countries.

For the foregoing reasons, I am sure you will understand why we are unable to respond in the affirmative to your request. I look forward to the day when ultimately all of the papers in the Library can be made available.

Sincerely yours,

Harry Middleton
Director

Honorable J. W. Fulbright
Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

HM:njh

EXHIBIT "C"

United States Senate
Washington, D.C. 20310
July 28, 1972

Mr. Harry Middleton
Director
Lyndon B. Johnson Library
University of Texas
Austin, Texas

Dear Mr. Middleton:

I have been told that the memos by my father and Secretary Rusk which are referred to in my letter of July 19 were received by McGeorge Bundy and have been transferred to your possession at the Library. I have no idea what the ground rules are. If they are classified, perhaps something could be done at this end to release them. Be that as it may, I would be most grateful if you could help. My father's biography is now being edited. His edited writings are also being published. And the absence of his memo leaves a large gap in the historical record. It has been confirmed that the memo never reached President Johnson, so I don't

see how his interests are affected. My concerns are twofold, to preserve the history and my father's place in it.

Ever so many thanks for any help you can give me.

Sincerely,

/s/ Adlai E. Stevenson

ADLAI E. STEVENSON III
ILLINOIS

EXHIBIT "D"

United States Senate
Washington, D.C. 20310
July 19, 1972

Mr. Harry Middleton
Director, Lyndon B. Johnson Library
University of Texas
Austin, Texas

Dear Mr. Middleton:

In the latter part of 1964 and early 1965 my father and Secretary General U Thant were involved in a Vietnam peace initiative. The history of this affair is murky for my father was the only person with complete knowledge of the initiative from both ends—Thant and Washington. Unfortunately, he wrote only a few memos about the affair and these undoubtedly were classified by the government immediately after his death.

Harlan Cleveland states that my father wrote a memo about the peace initiative to the White House on February 17, 1965.

There is also a State Department memo, probably written about the same time, from Secretary Rusk to

McGeorge Bundy outlining, somewhat critically I understand, the State Department's view of this affair.

This initiative is not discussed in the "Pentagon Papers." Efforts to locate these memos and otherwise clear up the historical record have not been successful. I would be most grateful for any help you could give me.

Do you know where I would be able to obtain copies of the Rusk memo and the memo my father sent to the White House? Are you familiar with any other memos or documents written during this time about this initiative? Are there any personal recollections you could share with me about this matter?

Many thanks for any help you can give me.

Sincerely,

/s/ Adlai E. Stevenson

EXHIBIT "E"

August 3, 1972

Dear Senator Stevenson:

In response to your letters of July 19 and July 28, I am afraid I must give you a disappointing reply.

We have received, and I'm sure will continue to receive, a number of requests similar to yours. I think a certain amount of background information on the procedure for organizing and processing the papers on deposit in this Library will be helpful to you in understanding why it is not possible for us to make an affirmative response to these requests.

The task of organizing, reviewing and making available for research the 31 million papers in the Library's

collections is an enormous undertaking. The size of the task required, early in the Library's operation, that we establish a set of priorities for staff work and determine a schedule for opening the documents.

This was similar to the needs that other Presidential Libraries before us had recognized, and our conclusions were consistent with the ones arrived at by those institutions: We decided to concentrate first on processing and organizing the papers which could be opened most quickly—the papers concerned with domestic policy. This process has begun—we opened our first group of papers, those on Education, earlier this year—and it will continue over the next several years.

As soon as it is practical and feasible, we will move into the area of organizing and readying for review the materials relating to foreign relations. Those materials, however, present problems of substantial complications, because of the classification of many of the documents by different agencies and departments of government; because of their sensitivity; and because of their bearing on present U. S. relations with other countries.

In view of these circumstances, and following the procedures established in other Presidential Libraries, even after the task of organizing the foreign policy papers is completed, the Library itself cannot be the sole determiner of when those papers will be made available. That determination must be made in close consultation with those agencies of government having primary responsibility for the conduct of the Nation's defense and foreign affairs, and with consideration for the status of our continuing relationships with other countries.

At that time, the papers that are opened for review will be made available to all qualified researchers. Regulations established by The National Archives, following the dictates of the Freedom of Information Act, forbid our making certain papers available to individuals on a selective basis.

I hope that the foregoing reasons will give you a clearer understanding of why we are unable to respond in the affirmative to your request. This answer comes to you with my personal regrets, and my best wishes.

Sincerely yours,

/s/Harry Middleton
Director

Honorable Adlai E. Stevenson III
United States Senate
Washington, D.C. 20510

HM:jh

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM R. EMERSON

1. I, William R. Emerson, am presently the Director of the Franklin D. Roosevelt Library (hereinafter referred to as "the Library"), National Archives and Records Service, General Services Administration, located in Hyde Park, New York. I have held this position since I was appointed to it on July 1, 1974, this being my first formal connection with the Roosevelt Library or the National Archives and Records Service.

2. In the course of discharging my official duties, I have obtained personal knowledge of the contents of the Library and its use by government officials, journalists,

historians, and other researchers. I have also caused the administrative files of the Library to be searched to determine such use.

3. The Roosevelt Library was built in 1939-1940, after President Roosevelt determined that all his papers, materials, and artifacts were to be contained in a special library on the grounds of his estate at Hyde Park, New York.

4. Although some of President Roosevelt's White House papers werre stored in the Library to relieve pressure on storage space during his third and fourth terms, the bulk of his White House papers were physically transferred to the Library after his death in 1945.

5. The major notable exception to this transfer was the so-called "Map Room" papers to be discussed below.

6. The Library contains approximately twenty-one (21) million pages of documentation in over one hundred seventy (170) collections. Approximately ten and one-half (10.5) million of these constitute the papers arising directly from Mr. Roosevelt's service as President of the United States.

7. Processing of the Roosevelt materials began in 1947 after legal technicalities connected with President Roosevelt's will were resolved.

8. By 1950, 85 percent of these materials had been opened to researchers. Today, less than one (1) percent of the papers are closed to research.

9. There are two types of restricted materials among the papers of President Roosevelt. One category comprises security-classified documents which are restricted under the authority of the various Executive Orders bearing on such matters. The second type comprises donor-restricted documents which, for varying periods of

time, are closed in accordance with the instructions of donors or their agents.

10. Security classified documents in the Library were received here in that status. Acting upon written instructions provided from time to time by the several Federal agencies (including the Department of Defense, the Department of State and the Joint Chiefs of Staff, among others) the Library has declassified the great bulk of these documents.

11. With regard to the matter of donor-restricted documents within the papers presented to the Library, the Library's archivists were guided by two documents: the "Memorandum for the Director of the Franklin D. Roosevelt Library" from President Roosevelt dated July 16, 1943, (a true and accurate copy of which is attached hereto as Exhibit A) and a letter to Dr. Wayne Grover, Archivist of the United States from the Honorable Samuel I. Rosenman and Grace G. Tully dated November 17, 1949, (a true and accurate copy of which is attached hereto as Exhibit B). Operating under the guidance set forth in these two documents, the Library's archives staff made a detailed examination of the said materials to determine which could be opened for research and which should remain closed for the time being.

12. In carrying out this examination, the archives staff necessarily had full and unrestricted access to this material, including the most personal and private letters and papers of President Roosevelt, his staff and his family, as a prerequisite to making the necessary determinations as to the proper access to be granted to such materials. This is the basic function of the professional archivist and the Library's archives staff conducted the processing of the Roosevelt material, both official and private, with a full sense of discretion and a

deep respect for the privacy and confidentiality of the material in its custody. I have no knowledge or indication of any improper disclosure of any information contained in security-classified or donor-restricted documents arising from the access given to the Library archives staff in this connection.

13. I have caused my staff to search the administrative files of the Library relating to access to the Roosevelt materials over the last thirty (30) years. I have attached hereto true and accurate copies of records in our administrative files which provide information about access to the Roosevelt materials given to government officials, representatives of the media, students, academicians, and other researchers. Our records indicate the following on research use of this Library as of June 30, 1975.

Number of research passes issued (valid for one year)	5,009
Number of research visits (1946-1975)	22,045
Breakdown on researchers:	
Government employees on official business (These people have personally visited Hyde Park to examine the Roosevelt presidential papers in connection with official research programs. This list includes representatives from Army, Navy, Defense, State, Atomic Energy Commission, Joint Chiefs of Staff, Central Intelligence Agency and National Security Agency.)	42
Officials of municipal, state and local governments	23
Officials of foreign governments	10
Representatives of the media (journalists, filmmakers, etc.)	147

The remainder of our researchers include professors, graduate and undergraduate students, free-lance writers, genealogists, and other researchers.

14. Exhibit C, attached hereto, are true and accurate copies of a series of documents in our files relating to arrangements made by President Truman to retain control for a period of time during his administration of certain of President Roosevelt's war-time materials, the so-called "Map Room Papers," and to eventually turn them over to the custody of the Library.

15. Exhibits D, E, F and G, attached hereto, are true and correct copies of documents in our files relating to White House requests for material in the Roosevelt Library. Exhibit D shows the Library responding to White House requests for material on President Roosevelt's war-time communications with Generalissimo Chiang Kai-Shek. Exhibit E reveals the Library's response to a White House request concerning materials relating to the declaration of martial law in Hawaii in 1941. Exhibits F and G, respectively, indicate responses to White House requests for material on the manner in which Cabinet meetings were conducted and confidential material dating from 1933, and restricted as to access, which was needed in connection with a lawsuit in 1953.

16. Exhibits H and I, attached hereto, are true and accurate copies of documents indicating the Library's extensive relations with the Department of State and the Department of the Army in connection with their scholarly publications program—*Foreign Relations of the United States* and *The U. S. Army in World War II.*

17. Exhibits J through S are also true and accurate copies of documents in Library files. Exhibit J is a letter of introduction by the Joint Chiefs of Staff given to a Dutch naval officer engaged in historical research. Exhibit

K shows the Library providing documentation to the Department of Justice bearing on a suit at law. Exhibit L is a request from a CIA official for information about a collection which had only recently come into the Library's possession. Exhibit M involves an inquiry by an official of the National Security Agency about a possible intervention by Prime Minister Churchill in matters bearing on cryptographic security during World War II. Exhibits N through Q show the Library responding to requests by the Atomic Energy Commission, the Air Force, the Civil Service Commission and the Secret Service for documentation of various kinds. Exhibit R involves a personal request by a Senator, Mr. McKellar, and Exhibit S an official request by another Senator, Mr. Eastland, for information on an official of the Roosevelt Administration whose activities were then under investigation by a Senate Committee.

18. Exhibit T includes several documents, which are true and accurate copies of records in Library files, which are samples of hundreds of requests in our files from government officials for various materials in the Roosevelt Library.

19. Exhibit U includes several documents, which are true and accurate copies of records in Library files, which are samples of approximately fifty (50) applications for admission to search rooms in the Library by government officials on official business.

/s/William R. Emerson
WILLIAM R. EMERSON

Sworn and subscribed to
before me this 22nd day of July, 1975

/s/F. James Devine
Notary Public
My Commission expires: March 30, 1977
[SEAL]

EXHIBIT A

The White House
Washington

July 16, 1943

MEMORANDUM FOR

THE DIRECTOR OF THE FRANKLIN D. ROOSEVELT LIBRARY

1. Before any of my personal or confidential files are transferred to the Library at Hyde Park, I wish to go through them and select those which are never to be made public; those which should be sealed for a prescribed period of time before they are made public; and those which are strictly family matters, to be retained by my family. If by reason of death or incapacity I am unable to do this, I wish that function to be performed by a Committee of Three, namely, Samuel I. Rosenman, Harry L. Hopkins and Grace G. Tully, or the survivors thereof.

2. With respect to the file known as "Famous People's File", the same procedure should be followed. Those which are official letters may be turned over to the Library, but those which are in effect personal such as, for example, the longhand letters between the King of England and myself, or between Cardinal Mundelein and myself, are to be retained by me or my Estate and should never be made public. There are many such examples and

this Committee will do the selecting in the event that I am unable to do so for the above mentioned reasons.

3. With respect to the file called "Family Letters", in the main they are to be retained by me or my Estate. However, the Committee should have the discretion of selecting a few which in their judgment could be given to the Library and made public

4. In all of the papers which are to be turned over to the Library from my personal files or from nonpersonal, official files, there will be some which should not be published until a lapse of a certain length of time and which, in the meantime, should be put under seal. This is for the reason that they may refer to people who are still alive in a way which would be embarrassing to them. The aforesaid Committee of Three should determine which letters should be so sealed and the length of time of sealing. I should judge that the average length of time of sealing should be from ten to fifteen years, but there may be some which sould be sealed for as many as fifty years.

/s/Franklin D. Roosevelt

EXHIBIT "B"

November 17, 1949

Dear Dr. Grover:

The undersigned are the surviving members of a Committee designated by President Franklin D. Roosevelt in a memorandum signed by him on July 16, 1943, to go through his papers and to select those that should be sealed for a period of time before being made public.

This was a task which, according to the memorandum, he was himself to have performed, if he had lived.

Since it was obviously impossible for us personally to examine the four or five million papers now in the Franklin D. Roosevelt Library at Hyde Park, it was arranged for you and your staff to segregate the papers in accordance with certain standards which we had agreed upon. We understand that these standards are the ones now generally used in relation to government records.

Following are the categories of papers to be restricted for the time being:

1. Investigative reports on individuals.

2. Applications and recommendations for positions.

3. Documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals.

4. Documents containing information concerning personal for family affairs of individuals.

5. Documents containing information of a type that could be used in the harassment of living persons or the relatives of recently deceased persons.

6. Documents containing information the release of which would be prejudicial to national security.

7. Documents containing information the release of which would be prejudicial to the maintenance of friendly relations with foreign nations.

You and we have agreed that there should temporarily be excluded communications addressed to the President in confidence, the publication of which at this time, so soon after the President's death and termination of office, might result in discouraging confidential communications to Presidents in the future. A majority of such communica-

tions would, of course, also be included in one or more of the foregoing seven categories.

We have gone over the preliminary segregation that you and your staff have made, and have made several revisions with which you have expressed accord.

We are glad to learn that as a result of this process, you will be in a position by March 17, 1950 to open for research use about 85 percent of the total volume of the Roosevelt papers now in the Library covering the period 1910-1945.

The restricted papers should be re-examined periodically, and opened as soon as the passage of time has removed them from the categories enumerated above. In our opinion there will be comparatively few papers which will have to remain restricted for a period longer than twenty-five years from the date of President Roosevelt's death.

Very sincerely yours,

/s/Samuel I. Rosenman
/s/Grace G. Tully

Dr. Wayne G. Grover
Archivist of the United States
National Archives

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM R. EMERSON
DIRECTOR OF THE FRANKLIN D. ROOSEVELT LIBRARY

CITY OF HYDE PARK)
) ss:
STATE OF NEW YORK)

WILLIAM R. EMERSON, being first duly sworn, deposes and says:

1. I am Director of the Franklin D. Roosevelt Library ("the Library"), which is part of the National Archives and Records Service ("NARS") in the General Services Administration. I was appointed to this position in July 1974.

2. The collection housed in the Library includes the Presidential materials of President Roosevelt, as well as approximately 170 other collections of associates of the President, including, for example, his Secretary, Steven T. Early, his wife Eleanor, and his advisers, such as Harry Hopkins and Adolf A. Berle, Jr. It contains in all more than twenty-one million documents.

3. In committing the Presidential materials to the Library, President Roosevelt specified seven categories of materials for special treatment within the collection and created a Committee of three individuals—Samuel Rosenman, Harry Hopkins, and Grace Tully—to oversee the implementation of such treatment. The restrictions included limitations on access to private and personal materials, among other things. The Committee delegated to the Director of the Library the duty of reviewing all materials within the collection to determine which materials fell within the seven categories and should be restricted and which on due consideration should be

opened. I inherited that duty in July 1974 when I became Director of the Library and I discharge it today.

4. In carrying out this duty, I or my staff peruse the papers, and I then decide whether access to a particular paper should still be restricted as private or personal (or subject to another restriction) on a case-by-case basis, arriving at decisions on my own authority but in consultation with the other archivists on my staff. In this manner, the entire collection of the Library has been reviewed and categorized. The staff continually reviews portions of the collection closed to researchers to determine whether the passage of time would justify opening them, consistent with the applicable restrictions. At this time less than one-half of one percent of the materials are still restricted on the grounds that they are private or personal materials or otherwise subject to Mr. Roosevelt's restrictions.

5. When we receive a request for access to any of these remaining restricted materials, an archivist on my staff or I will review each document requested to determine whether it is private or personal and thereby not subject to disclosure.

6. In order to review security-classified material, two members of my staff of archivists, and myself, have secured top secret security clearances. We have not required higher security status. In no instance has our security status precluded our reviewing material.

7. I have been Director of the Library since July 1974. I was selected by Arthur Sampson, Administrator of General Services, on the advice of James B. Rhoads, the Archivist of the United States, under applicable Civil Service procedures. My job here—and that of the other archivists—is that of a professional. The archivists who comprise the Library's staff have each completed courses in professional

training in archival practices and in most cases hold advanced academ ic degrees. As part of normal archival duties, archivists routinely read or review papers and materials that are private or personal, security classified or restricted in other ways. As professionals, archivists are imbued through training, and an understanding of their legal obligations, with an absolute commitment to discretion and integrity in the performance of their duties. No objections have ever been registered by members of the late President Roosevelt's family regarding the handling of materials in the collection by the Library staff. Nor is there to my knowledge any evidence or indication of any improper disclosure of any information contained in security-classified or donor-restricted documents arising from the access given to the Library's archives staff in connection with its work upon them.

/s/William R. Emerson
William R. Emerson

Subscribed and Sworn to Before me
this 23rd day of July, 1975.

/s/Oliver S. Gring #6602100
Notary Public
Commission expires May 30, 1976

[Copy Omitted in Printing]

AFFIDAVIT OF JEANNE W. DAVIS

1. I, Jeanne W. Davis, am the Staff Secretary of the National Security Council (hereinafter "NSC"). I have held this position since June, 1970. My responsibilities include the review of the work of NSC Staff members for general responsiveness to the requirements of the

President and his Assistant for National Security Affairs, including organization, presentation, format and proper coordination. I also serve as the principal point of contact on NSC matters for the Offices of the NSC members and other Executive Departments. My office circulates paper for meetings of the NSC and its sub-groups, records the actions of the NSC and the decisions of the President on national security policy questions and helps insure that the officials concerned are informed of the workings of the NSC and the decisions of the President. I have overall responsibility for the assignment of action on the staff, the control and information documents to the President or Mr. Kissinger and the maintenance of the official NSC files.

2. The statutory function of the NSC is to advise the President with respect to the integration of domestic, foreign and military policies relating to the national security. (Pub.L. 253, Title I, Section 101, 80th Congress, approved July 26, 1947, as amended by Section 307 Pub.L 165, 82nd Congress, approved October 10, 1951. By reorganization Plan No. 4, effective August 20, 1949, the Council was placed in the Executive Office of the President, 50 U.S.C. 402.) Subject to the direction of the President, it is the responsibility of the NSC to assess and appraise the objectives, commitments and risks of the United States in relation to actual and potential military power, to consider policy on matters of common interest to the departments and agencies of the government, and to make such recommendations and such other reports to the President as it deems appropriate or as the President may require. As an advisory body to the President, the NSC's organization has been shaped to meet needs of individual Presidents and to be compatible with their methods of work. At the present time, the NSC is the principal forum through

which major issues of national security policy are identified, analyzed and brought to the President for decision. The NSC itself is not a decision-making body.

3. In 1953, which President Eisenhower appointed Mr. Robert Cutler as his Special Assistant for Security Affairs, he announced that this official would also be the principal Executive Officer of the NSC. This practice has been continued by each succeeding President. During the administrations of Presidents Johnson and Kennedy, much of the formal structure of the NSC was not used and the NSC in essence became an extension of the White House staff. In 1969 President Nixon revitalized the machinery of the NSC and President Ford has affirmed a commitment to maintain the NSC as the formal structure for foreign policy decision making. Under Presidents Nixon and Ford, the Assistant for National Security Affairs (Mr. Kissinger) has served in both the role of chief supervisory officer of the NSC system and the role of Advisor to the President. The NSC staff members have supported Mr. Kissinger, as Assistant to the President, in both capacities.

4. Material generated by the NSC is separated into two types of files. The first we refer to as "institutional files" and the second as non-institutional files.

5. The institutional files of the NSC contain all National Security Study Memoranda and Decision Memoranda and all reports and recommendations prepared for the Council. These files also include minutes of NSC and sub-group meetings, briefing papers, and material related to NSC organizations. The current files are maintained in my office or by the Secretariat in an alarmed vault in NSC offices in the OEOB. Older institutional files are stored in classified depositories outside Washington, D.C. In addition, the NSC staff files contain other records, such as correspondence concerning Freedom of Informa-

tion requests and NSC staff correspondence with the public. The NSC administrative files contain primarily personnel records. As files of a statutory body, the NSC institutional files serve to preserve continuity in the decision-making process in the area of national security. These files have always been retained by NSC from Administration to Administration and these are available to subsequent Presidents for these purposes.

6. Non-institutional files are also maintained by the NSC staff. They include the following types of records; briefing material for presidential meetings, records of negotiations with foreign governments, correspondence with foreign heads of state and government, correspondence—including presidential directives—with agencies in the Executive Branch on matters concerning foreign affairs but not considered part of the NSC institutional process, and various other types of classified correspondence on matters of foreign policy interest. The information contained in these files is staffed and prepared in NSC staff offices and is processed through the NSC Secretariat. When an action is completed, the NSC Secretariat forwards the set of papers involved to a secure document receiving area, operated by NSC Staff in the White House (neither in Central Files nor Special Files). There the records are maintained for access by the President, the Assistant to the President for National Security Affairs and his staff. These files, although maintained and accessable to NSC staff personnel, are considered by NSC to be presidential files and have in the past been boxed and removed by presidents when an administration changes.

7. Other non-institutional files includes materials which relate to foreign affairs, but which are filed in White House Central Files. These files are also processed for the President through and by the NSC Staff. These

files include official presidential documents, congressional and public correspondence, legislative documents, speech material, and unclassified, non-substantive records. These are maintained by White House personnel on the ground floor of the Old Executive Office Building and are treated by a departing president the same as other presidential materials. Such documents have been available in the White House for NSC reference purposes during the life span of a particular administration, and afterwards, at the appropriate presidential library.

8. These non-institutional files are not available in the White House to succeeding presidents because past presidents have customarily removed such presidential materials as they have departed from office. Succeeding presidents, their staffs and NSC staff acting on their behalf, are able to have access to these foreign policy documents of previous administrations through the various presidential libraries which have been established after the president has left office. During President Nixon's term, as in other administrations, the NSC staff had occasion to use the non-institutional foreign policy documents of previous administrations.

9. In general, there is no overlap between the NSC files and the White House files maintained by NSC staff personnel. The only exception concerns NSC institutional documents which, in addition to being maintained in the NSC files, are also included in Presidential files stored in the White House. Copies of non-institutional documents are not maintained by the NSC as permanent records.

10. In carrying out current Government business it has been necessary to review certain papers of the Nixon Administration which are maintained in the vault in room 207 of the Old Executive Office Building. These papers have included records of negotiations and Presidential

and other high-level correspondence with foreign officials. Some specific illustrations of the on-going need for Nixon Administration material follow.

11. President Ford will be traveling in the near future to the People's Republic of China. In preparation for this meeting with leaders of the People's Republic, the President will need to be briefed on the negotiations with these leaders conducted by President Nixon during his visit there in 1972 and by Mr. Kissinger, his Assistant for National Security Affairs, which took place both before and after Mr. Nixon's visit. The basis for much of our China policy is contained in the papers of the Nixon Administration which are non-institutional and therefore not part of the permanent institutional records retained by the NSC. Without the ability to review our past understandings with the Chinese, as reflected in these documents, the President would be inadequately prepared for his forthcoming meetings with the PRC officials.

12. The United States has continued its efforts with the parties to the Arab-Israeli dispute in an attempt to resolve outstanding differences and bring about a lasting peace in the Middle East. The negotiating positions of all parties have substantially changed many times. It is essential that we be able to review the records in order to trace the development of a particular negotiating position if we are to play a mediating role. Without ready access to the Nixon administration material, of which the basic negotiating papers are a part, our effectiveness would be seriously diminished.

13. Until recently we had frequent occasion to review material relating to Vietnam, in particular the negotiations which led to the 1973 Paris Peace Agreement. In addition, Congressional and media inquiries as to commitments which may have been contained in

exchanges between Presidents Nixon and Thieu required a thorough review of this material to determine the actual facts. Without ready access to these papers the response would have been based only on recollections and the assurances of others and could not be adequately supported with written documents.

14. Our on-going Strategic Arms Limitations Talks (SALT) with the Soviet Union began during the early years of the Nixon Administration. Many different positions have been discussed and various agreements have been signed. We simply could not continue these most significant negotiations without access to an official record of previous agreements and negotiating positions.

15. It would, of course, be possible to continue to operate without access to the material filed in room 207, OEOB, if we could keep working copies of the documents. Indeed, we have retained copies of a limited number of those documents most often required in the White House office of the Assistant to the President. We have, however, kept this practice to a minimum and are not in a position to anticipate future needs with regard to access to the Nixon material.

16. In addition to reviewing these papers for the purposes of on-going Government business, we have also been required to review the original documents to determine whether they are properly classified and properly marked with the classification and exemption categories, pursuant to Executive Order 11652. When we have discovered documents which are not correctly classified or marked, we have added the requisite information so that the documents will conform to the appropriate classification requirements. This has been done to assist the future custodians of these documents who will be called upon to respond to requests for the declassification and release of these records.

/s/Jeanne W. Davis
JEANNE W. DAVIS

Subscribed and sworn before me
this 25th day of July, 1975.

/s/Albert E. Brown
Notary Public

My Commission expires: May 31, 1978

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN STEWART

1. I, John Stewart, am the Assistant Director for Archives of the Kennedy Library, Waltham, Massachusetts. I served as Acting Director of the Kennedy Library from November 1968 to November 1971 and since that time have been Assistant Director.

2. In September, 1969, the Kennedy Library was established as a formal organizational unit of the National Archives and Records Service. Although there had been some archival processing of these materials prior to that time, substantial archival processing and opening of segments of the materials began on that date. Today, approximately 85 percent of the total volume of the papers of President Kennedy have been processed.

3. The White House files of President Kennedy came into the custody of the National Archives and Records Service in a variety of ways. The voluminous Central Files were shipped from the White House to the National Archives building in February 1964; the files of McGeorge Bundy, Special Assistant to the President for National Security Affairs were shipped from the White

House in August 1965; and the files maintained by the President's personal secretary, Mrs. Evelyn Lincoln were transferred October 1965.

4. In my positions as Acting and Assistant Director, I have acquired personal knowledge of the procedures of the library as they pertain to those seeking access to materials, both open and closed.

5. I have caused to be searched a number of the files of the Library to ascertain those who have sought and been allowed access to the Library's presidential materials.

6. There have since 1965, been a number of requests by officials of the federal government for access to materials in the Kennedy Library of both a security classified and non-security classified nature. Among these are the following:

(a) There are twelve (12) staff members of the Church Committee on CIA activities currently doing research in the library.

(b) During 1973, an official of the National Park Service did a study of the funding of the National Cultural Arts Center (Kennedy Center).

(c) In 1973, an officer of the Office of Chief of Military History of the Department of the Army did a study in the Kennedy Library on the integration of the armed forces.

(d) Early in 1975, two researchers from the Naval Historical Center did a study on the Bay of Pigs incident.

(e) An official of the Office of the Secretary of Defense has done a study of classified materials on Soviet and American strategic weapons development.

(f) An official of the National Aeronautics and Space Administration has done studies in classified materials on the history of the National Aeronautics and Space Administration from 1957 to 1961.

(g) An official of the Central Intelligence Agency has reviewed documents related to Cuban activities.

(h) A Department of Defense funded institute has also conducted research on the Apollo Space program.

7. I know of no situation in which a request for access to closed materials was made by anyone to officials of the National Archives and Records Service and then denied by the Donors' Committee, the group representing the Kennedy family on matters of access to the papers.

8. The Donors' Committee has delegated to the Library staff the authority to remove restrictions and open material closed in the course of the initial review, and materials which had been classified and then declassified.

9. In carrying out the archival processing of the materials in the Kennedy Library, the staff of the Library had full and unrestricted access to many of the personal and private documents of President Kennedy and his family, including, for example, some financial records. It was necessary that we carefully examine these materials to make an initial determination regarding public access. We approached this work with full respect for the privacy of these documents and I know of no improper disclosure of security classified or donor-restricted documents because of the access to and processing of these materials by the Library staff.

/s/John Stewart
JOHN STEWART

Subscribed and sworn to before this 28th day of July, 1975.

/s/J. Richard Quinlan
Notary Public

My Commission expires: 12/15/78

[Caption Omitted in Printing]

AFFIDAVIT OF DANIEL J. REED

1. I, Daniel J. Reed, am Assistant Archivist, Office of Presidential Libraries, National Archives and Records Service, General Services Administration. I have held this position since August 12, 1968. In the course of my official duties, I have gained personal knowledge of the operations and general procedures of the presidential libraries of Herbert Hoover, Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, and Lyndon B. Johnson.

2. By joint resolution of Congress, S.J. Res. 118, H.J. Res. 268, approved July 18, 1939, the Franklin D. Roosevelt Library was established.

3. In accordance with the provisions of the Presidential Library Act of 1955 (P.L. 84-373, 44 U.S.C. 2107-08 (1970)), presidential libraries for Presidents Hoover, Truman, Eisenhower, Kennedy, and Johnson have subsequently been established.

4. The Herbert Hoover Presidential Library in West Branch, Iowa, includes approximately 1,000,000 pages of documents arising from Mr. Hoover's service as President.

5. The Franklin D. Roosevelt Library in Hyde Park, New York, includes approximately 10,500,000 pages of

documents arising from Mr. Roosevelt's service as President.

6. The Harry S. Truman Library in Independence, Missouri, contains approximately 5,800,000 pages of documents arising from Mr. Truman's service as President.

7. The Dwight D. Eisenhower Library in Abilene, Kansas, contains approximately 11,000,000 pages of documents arising from Mr. Eisenhower's service as President.

8. The John F. Kennedy Library, currently located in the Federal Archives and Records Center in Waltham, Massachusetts, contains approximately 13,000,000 pages of documents arising from Mr. Kennedy's service as President.

9. The Lyndon B. Johnson Library in Austin, Texas, contains approximately 17,000,000 pages of documents arising from Mr. Johnson's service as President.

10. The archivists at these presidential libraries solicit, arrange, describe, and make available to the public the materials in the presidential libraries.

11. In the course of arranging and describing presidential historical materials at these libraries, the archivists routinely review materials of the President, his staff, and his family and make determinations concerning access to them. Such documents in many instances include those of a personal or private nature, such as medical letters or personal diaries. Library archivists likewise review security classified documents on a regular basis. The archivists, because of their professional experience and training, are skilled in reviewing and segregating such materials.

12. In the course of my supervision of these libraries, I am aware that various federal agencies have sought access to materials in presidential libraries for ongoing governmental purposes. White House officials have made use of some presidential libraries for foreign affairs and national security purposes. Examples of government agencies that have sought access to materials in presidential libraries are the Department of State, the Department of Defense, the Department of the Interior (National Park Service), the Central Intelligence Agency, and the U.S. Energy Research and Development Administration (formerly Atomic Energy Commission). In addition, the Department of State and the various departments of the military have made use of the presidential libraries to develop historical studies for the agency's use.

13. In the course of my supervision of these libraries, I am aware of requests for access by committees of the Congress to materials in presidential libraries. Two examples of such requests are the Senate Committee on the Judiciary, Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws under S.Res. 366 (81st Congress); and the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities. These requests have been honored.

14. Many private researchers seek to inspect confidential or security classified documents in presidential libraries. When such private researchers seek access to classified materials, the presidential libraries handle their requests for mandatory review and declassification of such documents in accordance with the provisions of Executive Order No. 11652, ___ F.R. ___ ( ). A copy of which is attached hereto as Exhibit A.

15. In deeds dated December 30, 1968, and March 27, 1969, Richard Nixon entered into agreements with

the General Services Administration providing for the arrangement and description of certain of his pre-presidential materials by archivists employed by the National Archives. (Copies of deeds attached as Exhibits B and C).

16. Attached hereto as Exhibit D is a true and accurate copy of the "Study of Presidential Units and Their Records," a document prepared by the staff of the National Archives and Records Service in the course of their official duties.

/s/Daniel J. Reed
DANIEL J. REED

Subscribed and sworn to before this 25th day of July, 1975.

/s/Francis J. Heppner
Notary Public
My Commission expires: August 31, 1979

EXHIBIT B

CHATTEL DEED
from
RICHARD M. NIXON
to
THE UNITED STATES OF AMERICA

Dated: December 30, 1968

The undersigned, Richard M. Nixon, does hereby give, assign, transfer, set over and deliver unto The United States of America all of his right, title and interest in and to the papers, manuscripts and other materials (herein-

after collectively referred to as "the Materials") which are listed and described in Schedule A annexed hereto and hereby made a part hereof, to have and to hold the same to The United States of America forever.

This conveyance is made to The United States of America without any reservation to the undersigned, Richard M. Nixon, of any intervening interest or any right to the actual possession of the said Materials, it being understood that the delivery of this Chattel Deed to the General Services Administrator shall convey to The United States of America the right and power immediately to take possession of the said Materials and to hold, use and dispose of the same, subject only to the following commitments made on behalf of The United States of America by the General Services Administrator:

1. The undersigned shall have the right of access to any and all of the Materials and the right to copy or to have copied any and all of the Materials by any means of his selection, and to take and retain possession of any or all such copies for any purpose whatsoever. During such time as the undersigned shall hold the office of President of the United States, no person or persons shall have the right of access to such Materials except the undersigned and those who may be designated in writing by the undersigned, and in the case of any person or persons so designated, such right of access shall be limited to those Materials as shall be described in the instrument by which he, she, it or they shall be designated, and for the purposes specified in such instrument; and, if such instrument shall so provide, the person or persons designated therein shall have the further right to copy such of the Materials as shall be described in such instrument and to take and retain possession of such copies for such purposes as shall be specified in said instrument. The undersigned shall

have the right and power at any time during his lifetime to modify or remove this restriction as to any or all of the Materials and/or to grant access to any group or groups of persons by notification in writing to the General Services Administration or other appropriate agency of The United States of America.

2. If a Presidential archival depository shall be established for the housing and preservation of the Materials pertaining to the career of the undersigned in public service, then, as soon as practicable after the establishment of such depository, the Materials shall be transferred to and thereafter housed and preserved at such Presidential archival depository. Until the establishment of such a depository, the Materials shall be housed and preserved at a place to be selected by the General Services Administrator or other appropriate agency of The United States of America.

3. None of the foregoing restrictions is intended to prevent the Materials from being used exclusively for public purposes, and in no event shall any of the said restrictions be so construed.

4. Notwithstanding the foregoing restrictions, employees specifically designated by the archivist of the National Archives and Records Service shall, in the course of performance of their necessary archival duties, have such access to the said Materials as shall be necessary for normal archival processing activities.

By the signature of his duly authorized agent below, the General Services Administrator accepts this conveyance for and on behalf of The United States of America, and confirms the commitments made by his office on behalf of The United States of America, as set forth above.

This instrument is executed in duplicate, each of which is an original, but both of which taken together shall be deemed one and the same instrument.

Dated: [Illegible]

/s/Richard M. Nixon
Richard M. Nixon

GENERAL SERVICES ADMINISTRATION
By /s/[Illegible]

SCHEDULE A ANNEXED TO AND PART OF CHATTEL DEED FROM RICHARD M. NIXON TO THE UNITED STATES OF AMERICA DATED DECEMBER 30, 1968

The materials conveyed by the Chattel Deed of which this Schedule is a part are located in packing cases identified by roman numbers I through XXI. The column at the left identifies each packing case by reference to its number, the center column describes the materials contained in such case in general terms and the column to the right shows the approximate number of items contained in such case.

I	Children's Letters	)
		)
II	" "	) 9,000 items
		)
III	" "	)
IV	82nd Congress	2,500 items
V	Campaign of 1964	3,000 items
VI	1965 Appearances, Trips	3,000 items

VII	Plaques and Key (5) Whittier Year Book 1966 8 Tapes	13 items
VIII	Far East Trip	3,000 items
IX	1960 Campaign	3,000 items
X	1959 Speech Files (Correspondence and copies)	3,000 items
XI	1964 Campaign Tapes in Chronological Order	24 items
XII	Plaques, Key, Picture	10 items
XIII	1960 Campaign Clippings	1,000 items
XIV	*Six Crises* Manuscript	2,000 items
XV	1959 Appearances, Trips	1,250 items
XVI	1953 Trip—Far East Letters, Notes	2,000 items
XVII	1955 Central American Trip	3,000 items
XVIII	1956 Trip—Philippines, Pakistan, etc.	3,000 items
XIX	1964 Correspondence Prior to Republican Convention Young People's Correspondence Book on 1964 Convention	1,250 items
XX	1954 Itineraries, Appearances Foreign Dignitaries (met by RMN)	1,250 items
XXI	1964 Campaign Notes (plus 2 Books and Framed Plaque)	3 items

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EXHIBIT C

CHATTEL DEED
from
RICHARD M. NIXON
to
THE UNITED STATES OF AMERICA

Dated: March 27, 1969

The undersigned, Richard M. Nixon, does hereby give, assign, transfer, set over and deliver unto The United States of America all of his right, title and interest in and to the papers, manuscripts and other materials (hereinafter collectively referred to as "the Materials") which are listed and described in Schedule A annexed hereto and hereby made a part hereof, to have and to hold the same to The United States of America forever.

This conveyance is made to The United States of America without any reservation to the undersigned, Richard M. Nixon, of any intervening interest or any right to the actual possession of the said Materials, it being understood that the delivery of this Chattel Deed to the General Services Administrator shall convey to The United States of America the right and power immediately to take possession of the said Materials and to hold, use and dispose of the same, provided, however:

1. The undersigned shall have the right of access to any and all of the Materials and the right to copy or to have copied any and all of the Materials by any means of his selection, and to take and retain possession of any or all such copies for any purpose whatsoever. During such time as the undersigned shall hold the office of President of the United States, no person or persons shall have the right of access to such Materials except the undersigned and those who may be

designated in writing by the undersigned, and in the case of any person or persons so designated, such right of access shall be limited to those Materials as shall be described in the instrument by which he, she, it or they shall be designated, and for the purposes specified in such instrument; and, if such instrument shall so provide, the person or persons designated therein shall have the further right to copy such of the Materials as shall be described in such instrument and to take and retain possession of such copies for such purposes as shall be specified in said instrument. The undersigned shall have the right and power at any time during his lifetime to modify or remove this restriction as to any or all of the Materials and/or to grant access to any group or groups of persons by notification in writing to the General Services Administration or other appropriate agency of The United States of America.

2. If a Presidential archival depository shall be established for the housing and preservation of the Materials pertaining to the career of the undersigned in public service, then, as soon as practicable after the establishment of such depository, the Materials shall be transferred to and thereafter be housed and preserved at such Presidential archival depository. Until the establishment of such a depository, the Materials shall be housed and preserved at a place to be selected by the General Services Administrator or other appropriate agency of The United States of America.

3. Notwithstanding the foregoing restrictions, employees specifically designated by the archivist of the National Archives and Records Service shall, in the course of performance of their necessary archival duties, have such access to the said Materials as shall be necessary for normal archival processing activities.

4. None of the foregoing restrictions is intended to prevent the Materials from being used exclusively for public purposes, and in no event shall any of the said restrictions be so construed, nor are they intended to vest in the undersigned any ownership or title thereto.

This instrument may be executed in duplicate, or triplicate, each of which shall be deemed an original.

Dated: March 27, 1969.

RICHARD M. NIXON
PRESIDENT OF THE UNITED STATES
OF AMERICA

By /s/Edward L. Morgan
Deputy Counsel to the President

SCHEDULE A ANNEXED TO AND PART OF CHATTEL DEED FROM RICHARD MILHOUS NIXON TO THE UNITED STATES OF AMERICA, DATED MARCH 27, 1969

The materials conveyed by the Chattel Deed of which this Schedule A is a part, herewith deposited and housed in the National Archives Building, Washington, D.C., constituting six hundred thousand individual items contained within 1,176 file boxes, are more particularly described as follows:

I. GENERAL CORRESPONDENCE AS VICE PRESIDENT

Boxes "AANDAHL through ZWIENG"

Boxes 18 through 845, inclusive — 828 Boxes

II.	APPEARANCE FILE 1948-1962 Boxes 1 through 173	173 Boxes
III.	CORRESPONDENCE RE INVITATIONS 1954-1961	56 Boxes
IV.	FOREIGN TRIP FILES AS VICE PRESIDENT	116 Boxes
V.	VISIT OF KHRUSHCHEV TO UNITED STATES	3 Boxes
	Total:	1,176 Boxes

EXHIBIT H

[SEAL]

Comptroller General of the United States
Washington, D. C.

B-149372 September 20, 1974

The Honorable Joseph M. Montoya, Chairman
Subcommittee on Treasury, Postal Service
and General Government
Committee on Appropriations
United States Senate

Dear Mr. Chairman:

This refers to your letter of September 12, 1974, wherein you request our views on certain questions arising in connection with the Subcommittee's consideration of two proposed appropriations to the General Services Administration (GSA) which would provide

services, facilities, and benefits for former President Richard M. Nixon.

Our opinion is requested concerning the eligibility of former President Nixon for services and facilities under the Presidential Transition Act of 1963; limitations upon nonreimbursable details provided to him under the Presidential Transition Act; and the validity of an agreement between the GSA Administrator and former President Nixon regarding the preservation of the latter's Presidential historical materials. Each of these questions in the order here presented is treated separately below.

Eligibility of former President Nixon under the Presidential Transition Act

We have reviewed the correspondence between GSA and the Department of Justice which was enclosed with your letter to us. In a letter to the Attorney General dated August 12, 1974, the GSA Administrator expressed the view that the Presidential Transition Act does apply in former President Nixon's situation, and requested the Attorney General's opinion on this point. In a letter to the Administrator dated August 15, 1974, the Acting Assistant Attorney General, Office of Legal Counsel, held that the Transition Act is applicable to former President Nixon. While this matter is by no means clear, we agree, for the reasons stated hereinafter, with the conclusion expressed by GSA and the Department of Justice.

The purpose of the Presidential Transition Act of 1963, approved March 7, 1964, Pub. L. 88-277, 78 Stat. 158, 3 U.S.C. 102 note, as stated in section 2 thereof, is "to promote the orderly transfer of the executive power in connection with the expiration of the term of office of a President and the inauguration of a new President." To this end, section 3(a) authorizes the Administrator of

General Services to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties, necessary services and facilities including (1) suitable office space appropriately equipped and furnished; (2) compensation for office staffs, including the detail of Federal employees; (3) payment of experts or consultants or organizations thereof; (4) travel and subsistance allowances, including manual of Government or hired motor vehicles; (5) communications services; (6) printing and binding expenses; and (7) reimbursement to the postal revenues for the value of mailing privileges authorized under subsection 3(d). Section 4 of the Act provides in part:

> "The Administrator is authorized to provide, upon request, to each former President and each former Vice President, for a period not to exceed six months from the date of the expiration of his term of office as President or Vice President, for use in connection with winding up the affairs of his office, necessary services and facilities of the same general character as authorized by this Act to be provided to Presidents-elect and Vice-Presidents-elect. * * *"

Section 5 authorizes the appropriation of such sums as may be necessary for carrying out the purposes of the Act but not to exceed $900,000 "for any one Presidential transition * * *."

There are certain fairly specific limitations upon the applicability of the Presidential Transition Act. For example, under the definitions of "President-elect" and "Vice-President-elect" contained in subsection 3(c), services and facilities are available only to persons to accede to such offices as successful candidates in a general Presidential election. Also, incumbent Presidents and Vice Presidents who are reelected are not eligible for

transition services and facilities; nor would a new Vice-President-elect who is the running mate of a reelected incumbent President. *Cf.*, H. Rept. No. 301, 88th Cong., 1st sess., 5; S. Rept. No. 448, 88th Cong., 1st sess., 3.

In general terms, and even beyond that portion of the stated purpose in section 2, quoted previously, it is obvious from the basic statutory scheme and legislative history that the Transition Act was enacted only in consideration of a transition occurring through the normal electoral processes. Clearly, no thought was given to the possibility of a Presidential resignation, and, accordingly, it may fairly be said that Congress never specifically intended to make transition services and facilities available to a former President who had resigned. This observation might reasonably be considered sufficient to justify the conclusion that former President Nixon is not eligible for such services and facilities. However, we believe that the absence of a specific affirmative legislative intent in this regard need not be considered dispositive provided that the furnishing of transition services and facilities to a former President by resignation, albeit not foreseen as a possibility, may nonetheless be considered consistent with the express terms of the Transition Act and its general purposes. We further believe that both of these conditions are satisfied.

As noted previously, section 4 of the Transition Act authorizes the provision "to each former President" of services and facilities of the same general character as those authorized for Presidents–elect and Vice-Presidents-elect for a period not to exceed six months "from the date of the expiration of his term of office * * *." While the Transition Act itself does not elaborate upon the quoted language, consideration must be given in this regard to the so-called "Former Presidents

Act," approved August 25, 1958, Pub. L. 85-745, 72 Stat. 836, as amended, 3 U.S.C. 102 note. This statute authorizes the provision to each former President of a pension, office space, and staff allowances for the remainder of his life. A pension is also provided for the widow of a former President.

The relationship between the Transition Act and the Former Presidents Act appears significant in several respects. First, subsection (f) of the Former Presidents Act defines a "former President" as an individual who has held the office of President and whose service in that office terminated other than by removal through impeachment and conviction. Secondly, section 4 of the Transition Act expressly provides that the Former Presidents Act, except for the pension provisions, shall not become effective with respect to a former President until six months after the expiration of his term of office as President. This six-month delay in the operation of the Former Presidents Act was included on the assumption that a former President would, for the first six months after he leaves office, receive services and facilities under the Transition Act, and, therefore, was designed to avoid duplication and confusion resulting from the simultaneous operation of both acts during the six-month period. See H. Rept. No. 301, *supra,* 2-3; S. Rept. No. 448, *supra,* 4.

In view of the integral relationship between the two statutes, we believe it is reasonable that the definition of "former President" contained in the Former Presidents Act should be considered applicable as well under section 4 of the Transition Act. Former President Nixon would, of course, fall within this definition since he was not actually removed from office by impeachment and conviction.

A related matter is whether former President Nixon's "term of office" has expired for purposes of the Transition Act. The concept of "term of office" has different meanings in different contexts. See generally 67 C.J.S., Officers, §42, p. 196; 41 Words and Phrases, "Term of Office," pp. 621-628. While none of the contexts presented in the cited references are particularly analogous to the present consideration, there is some authority to the effect that a fixed term of office expires when the occupant leaves that office. See, for example, the following passage from the opinion of the New Jersey Supreme Court in *Board of Chosen Freeholders v. Lee,* 76 N.J.L. 327, 70 A. 925, 926 (1903):

> "The words 'term of office' may in a sense be used to indicate the statutory period for which an officer is elected. We speak of the term of office of the President of the United States and the term of office of the Governor of the state, meaning that the first was four years and the latter three years; but the words 'term of office' may also mean a period much shorter than that for which the particular officer was elected. His term of office may be terminated before the expiration of the statutory period for which he was elected by impeachment, or resignation, or death of the particular officer. The happening of these contingencies is an implied limitation upon the right of the elected officer to continue in office for the period for which he would otherwise be entitled to hold. When such a contingency occurs, the officer's term expires, there is a vacancy, and upon the appointment or election to fill the vacant office the term of another officer begins. To assert that a term of office of an impeached or deceased officer continues is to assert that there may be two terms of office running together, although the office can be filled but by a single person. * * *"

It seems to us that the relationship between the Former Presidents Act and the Transition Act sheds further light upon this matter. Former President Nixon's term of office either expired on the date of his resignation or it must, in effect, be viewed as continuing until January 20, 1977. The latter approach would produce the incongruous result, by literal application of section 4 of the Transition Act, that he would not qualify for application of the Former Presidents Act, other than the pension provision, until six months after January 20, 1977. Even if former President Nixon's term of office is considered to have expired on the date of his resignation, section 4 of the Transition Act would by its terms still delay operation of the Former Presidents Act in his case, other than the pension, for six months. This result, coupled with a holding that the substantive provisions of the Transition Act do not apply, would also be incongruous since, as noted previously, the only basis for the six-month delay is the assumption that a former President is receiving services and facilities under the Transition Act during this period.

For the foregoing reasons, we believe that former President Nixon may be considered eligible for services and facilities consistent with the express terms of the Transition Act; and, as indicated above, the opposite conclusion would seem to produce results which appear clearly at odds with a reasonable construction of the two statutes taken together. It is also our view that provision of transition services and facilities to a President who has resigned would be consistent with the general objectives of the Transition Act. As noted previously, section 2 of the Act states its purpose to be to promote the orderly transfer of executive power "in connection with the expiration of the term of office of a President and the

inauguration of a new President." Section 2 goes on to state, in part:

> "* * * The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government, both domestic and foreign. Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption. * * *"

Simply stated, we can perceive of no reason why a transition resulting from the resignation of a President would be any less significant in terms of the foregoing considerations as stated in section 2 than a transition following a general election; nor does it appear that the needs of a former President for services and facilities in connection with winding up his official affairs would be any less severe merely because he had resigned. On the contrary, such considerations and needs might even be considered more compelling following a Presidential resignation.

In sum, while former President Nixon's resignation gives rise to a unique situation in consideration of the Presidential Transition Act, it is our view that, on balance, a holding that he is eligible for transition services and facilities is less troublesome in terms of the design, operation, and general objectives of the Act than would be the contrary conclusion.

The analysis and conclusions expressed above do not take into account the particular circumstances leading to former President Nixon's resignation since such circum-

stances are, in our view, irrelevant to the legal issues presented. Thus the legal issues would necessarily be the same regardless of the reasons for a President's resignation. Finally, it is noted that the Presidential Transition Act is essentially operative on the basis of appropriations made pursuant to the authorization of section 5. Whether or to what extent appropriations are actually justified in the case of former President Nixon is a separate matter which must, of course, be determined by the Congress.

Nonreimbursable details provided to former President Nixon pursuant to the Presidential Transition Act.

You also request our comments concerning the amount of nonreimbursable details under that portion of paragraph 3(a)(2) of the Presidential Transition Act which states, with reference to staffing for President-elect and Vice-Presidents-elect:

> "* * * *Provided,* That any employee of any agency of any branch of the Government may be detailed to such staffs *on a reimbursable or nonreimbursable basis* with the consent of the head of the agency; and while so detailed such employee shall be responsible only to the President-elect or Vice-President-elect for the performance of his duties; *Provided further,* That any employee so detailed shall continue to receive the compensation provided pursuant to law for his regular employment, and shall retain the rights and privileges of such employment without interruption. * * *" (Emphasis added.)

The same authority to detail Federal employees clearly applies to a former President or Vice President under section 4 of the Act since it is a service "of the same

general character as authorized" for the incoming officials; and, in fact, section 4 expressly provides:

> "* * * Any person appointed or detailed to serve a former President or former Vice President under authority of this section shall be appointed or detailed in accordance with, and shall be subject to, all of the provisions of section 3 of this Act applicable to persons appointed or detailed under authority of that section. * * *"

The basic issue which arises in this regard concerns the relationship between the provision for nonreimbursable details and the overall $900,000 limitation upon appropriations authorized by section 5 of the Act, which provides:

> "There are hereby authorized to be appropriated to the Administrator such funds as may be necessary for carrying out the purposes of this Act but not to exceed $900,000 for any one Presidential transition, to remain available during the fiscal year in which the transition occurs and the next succeeding fiscal year. The President shall include in the budget transmitted to the Congress, for each fiscal year in which his regular term of office will expire, a proposed appropriation for carrying out the purposes of this Act."

Thus the question is whether the cost or value of nonreimbursable details, in terms of the salaries represented, is subject to the $900,000 appropriation authorization limitation under section 5 or, more specifically, any amount which is actually appropriated under section 5.

Absent an overall monetary limitation upon appropriations under the Transition Act, the express authority to detail employees on a nonreimbursable basis would clearly operate without restriction in terms of cost or

value. In elusion of the appropriation authorization limitation and the legislative history of the Act in this regard are somewhat perplexing in this respect. The original version of the Transition Act legislation included the authority to detail on a reimbursable or nonreimbursable basis. On the other hand, the original bill did not impose a limitation upon appropriations authorizing instead appropriation of "such funds as may be necessary for carrying out the purposes of this Act." See H.R. 4638, 88th Cong., 1st sess., as introduced on March 7, 1963. The House Committee on Government Operations added a $1.3 million appropriation authorization limitation in the version of the bill which it reported; and some monetary limitation remained in the legislation thereafter. See H.R. 4638 as reported May 15, 1963. However, we find no indication that the Congress ever considered the effect of a monetary limitation upon the provision expressly permitting nonreimbursable details.

At the same time, the legislative history clearly demonstrates that throughout consideration of this legislation the appropriation authorization limitation was viewed as representing the full scope and value of services and facilities under the Act. Thus the House Committee on Government Operations, in adopting a $1.3 million limitation, observed, H. Rept. No. 301, 88th Cong., 1st sess., 4:

> "The limitation of $1,300,000 for expenditures in any one fiscal year seems reasonable in view of the estimates presented. This can be changed by future legislation if experience so dictates. Any request for funds must, of course, be strictly justified before the appropriation is made by Congress."

During floor consideration, Congressman Fascell, the sponsor of the bill, stated, 109 Cong. Rec. 13350 (July 25, 1963):

> "The committee added to the bill a limitation on expenditures of $1,300,000 for all of the purposes of the bill in any one fiscal year. This seems a reasonable figure considering both incoming and outgoing Presidents and Vice Presidents and was based on the best estimates available to us. Of course, the specific figure to be appropriated in any year must be fully justified before the Appropriations Committee."

Thereafter the following colloquy, *id*, at 13351:

> "Mr. GROSS. * * * Can the gentleman from Florida tell me, if he will, please, how many $100-a-day consultants it is expected will be employed to take care of the incoming President and Vice President in 1964?
>
> "Mr. FASCELL. I may say to the gentleman from Iowa whatever the President can substantiate in his budget request and whatever he can get out of the Committee on Appropriations and whatever may be necessary or required within the limitation of the authorization under this act.
>
> "Mr. GROSS. It is wide open insofar as this bill is concerned, and insofar as the committee is concerned, that is, the Committee on Government Operations?
>
> "Mr. FASCELL. No, I would not say it is wide open at all. We do have a limit on the authorization and we do follow the normal appropriation procedure."

The Senate Committee on Government Operations retained the House–passed $1.3 million limitation in the version of the bill which it reported. The Senate

Committee incorporated the explanation of the House report in this regard. See S. Rept. No. 448, 88th Cong., 1st sess., 3. The Senate report also set forth, as had the House report, recommendation No. 8 of the President's Commission on Campaign Costs, which read in part:

> "We endorse proposals to *'institutionalize'* the transition from one administration to another when the party in power changes. Important reasons for doing so exist wholly aside from the costs to the parties. The new President must select and assemble the staff to man his administration, and they in return must prepare themselves for their new responsibilities.
>
> "We recommend that the outgoing President be authorized to extend needed facilities and services of the Government to the President–elect and his associates. *We also recommend that funds be appropriated, to be spent through normal governmental channels, for that purpose." Id.* at 2 (Underscoring supplied.)

During floor consideration in the Senate, an amendment was adopted which reduced the appropriation authorization limitation to $500,000, 109 Cong. Rec. 19737 (October 17, 1963); and the conferees agreed upon a compromise figure of $900,000. H. Rept. No. 1148, 88th Cong., 2d sess., 2.

Remarks during consideration of the conference report in each House again reflect the understanding that the limitation was comprehensive. In the Senate, Senator Miller observed with reference to the limitation, 110 Cong. Rec. 3397 (February 24, 1964):

> "* * * The Senator from Washington pointed out, in the conference, that this amount is a ceiling; it is not, necessarily the amount of money that will be appropriated. This is an authorization bill; and the Appropriation Committees may not approve amounts up to the ceiling thus set. The expenditures may not come anywhere near that amount. So perhaps the Senator from Georgia and I will, later, have an opportunity together to do something about getting this amount back to the amount which we think it really should be."

Senator Jackson added:

> "I desire to point out that we feel that this is definitely a ceiling; and in my judgment–speaking only for myself, although I am sure I also speak for the Senator from Iowa [Mr. Miller]–they can get along with well under the $900,000 figure." *Id.*

On the House side, Congressman Fascell stated, 110 Cong. Rec. 3539 (February 25, 1964):

> "* * * In the conference we agreed on $900,000 as a reasonable amount, with the expectation that if expenditures went higher than that amount, as we had anticipated in the authorization of the House bill, we could by way of supplemental request take care of the needed additional appropriation."

Again, a colloquy occurred between Congressman Gross and Congressman Fascell, *id.* at 3540:

> "Mr. GROSS. Is the $900,000 to cover both the President-elect and Vice-President-elect?
>
> "Mr. FASCELL. Yes.
>
> "Mr. GROSS. Would this cover the cost of jet planes and the Cadillacs to be assigned to them during the interim period?
>
> "Mr. FASCELL. If such were assigned to them, I would assume they would be covered in the budget request.
>
> "Mr. GROSS. This will not be in addition thereto?

> "Mr. FASCELL. Whatever the services are, itemized in the bill, are authorized and which would be covered by the appropriation. Since the authorization fixes those services, one could not go beyond that."

As indicated previously, the legislative history leaves no doubt that the appropriation authorization limitation was enacted with the intent that it would cover all services and facilities provided under the Transition Act. This intent is further reflected in the second sentence of section 5, relating to budget submissions. We believe that this manifestation of congressional intent is sufficient to overcome any implicit authority under the provisions of the Act to furnish services or facilities other than the detail of Federal employees on a nonreimbursable basis. Nevertheless, we must conclude that this legislative history is simply inconsistent with the Act's express grant of authority for nonreimbursable details. Accordingly, it is our opinion that nonreimbursable details under the Transition Act are not subject to monetary limitations under section 5 or any amount appropriated pursuant to section 5. Since, for the reasons stated above, it appears that this result may not have been intended, the Congress might wish to consider amending paragraph 3(a)(2) of the Transition Act to delete the reference to details on a nonreimbursable basis.

In this regard, it is our understanding that nonreimbursable services and facilities in addition to the detail of employees—such as use of existing Federal office space, equipment, and communications facilities—have in the past been provided under the Transition Act. While our decision at 48 Comp. Gen. 786, 789 (1969), referred to in the text hereinafter, might be considered as implicitly approving such additional nonreimbursable services and facilities, this was not intended and that decision should not be so viewed.

Notwithstanding the absence, in our view, of a monetary limitation, details of Federal employees are clearly subject to certain other conditions and restrictions under the Transition Act. First, as stated in the first proviso of paragraph 3(a)(2), such details may be made only with the consent of the head of the employing agency; although we know of no particular formalities which would apply in this regard.

Second, definite time limitations apply. By virtue of section 3(b), a Federal employee could be detailed to the staff of a President-elect or Vice-President-elect only for a period commencing on the day after a general Presidential election and ending not later than the date of inauguration. In the case of a former President or Vice President, the detail would be limited by section 4 to a period not to exceed six months following the date of expiration of the term of office, or, in former President Nixon's case, the date of his resignation. These time limitations would apply even if appropriations under the Act were made available for a longer period. See 48 Comp. Gen. 786, 789, (1969) (copy enclosed).

Finally, such details would be subject to the general limitations upon the purposes for which any services or facilities are provided pursuant to the Transition Act. In the case of a President-elect or Vice-President-elect, section 3(a) authorizes necessary services and facilities "for use in connection with his preparation for the assumption of official duties as President or Vice President * * *." Section 4 limits provision of services and facilities to a former President or Vice President to those necessary "for use in connection with winding up the affairs of his office * * *." See 48 Comp. Gen. 786, 789, *supra*, and our letter of September 11, 1974, to Congressman Joseph P. Addabbo, B-149372, page 2 (copy enclosed). In this regard, we feel constrained to

suggest that the Subcommittee carefully review the list of Federal employees presently detailed to former President Nixon and the functions which they are to perform. For example, GSA's list of employees now detailed to former President Nixon (Revised Justification, dated September 10, 1974) includes a "butler" and a "maid" who are on the payroll of the Park Service, as well as three "military drivers." It is not apparent to us how such employees would be used by a former President in connection with winding up the affairs of his office.

Validity of an agreement between the GSA Administrator and former President Nixon regarding the preservation of the latter's Presidential historical materials

The September 6 agreement between former President Nixon and the Administrator of GSA provides in some detail for the disposition of Mr. Nixon's Presidential historical materials. The term "historical materials" in the agreement is assigned the meaning given it by 44 U.S.C. 2101, as including–

> "books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings, and other objects or materials having historical or commemmorative value."

The stated purpose of the agreement is to preserve the materials until such time as Mr. Nixon's intention to donate a "substantial portion" thereof to the United States is consummated. His desire, in making the donation, is said to be that the materials be available, with appropriate restrictions, for research and study.

In 1950, legislation was first enacted authorizing the Administrator of General Services to accept for deposit–

> "the personal papers and other personal historical documentary materials of the present President of the United States, his successor, heads of executive departments and such other officials of the Government as the President may designate * * *,"

subject to restrictions specified by the depositors. Section 507(e) of the act of September 5, 1950, chapter 849, 64 Stat. 578, 588. The intent of this provision was to make it possible for the documents in question to be preserved by the Government with related official records and to be available for scholarly research. H. Rept. No. 2747, 81st Cong., 2d Sess., 15 (1950). Such materials had in the past often been dispersed and, sometimes, lost.

As enacted, the 1950 law did not provide for the Administrator to accept for deposit the papers of a former President, nor was there any provision for the establishement of depository libraries for Presidential papers apart from the National Archives. In 1955, legislation was enacted to achieve both these purposes. Act of August 12, 1955, ch. 859, 69 Stat. 695. Section 1 of the act of August 12, 1955, as amended, 44 U.S.C. 2107, authorizes the Administrator to accept for deposit–

> "the papers and other historical materials of any President or former President of the United States * * * subject to restrictions agreeable to the Administrator as to their use * * *."

The act also provides that:

> "The Administrator, in negotiating for the deposit of Presidential historical materials, shall take steps to secure to the Government, as far as possible, the right to have continuous and permanent possession of the materials * * *." 44 U.S.C. 2108(c).

The House Government Operations Commiteee report on H. J. Res. 330, 84th Congress, the derivative source of the act of August 12, 1955, states that:

> "The enactment of the resolution into law would end the lack of a systematic arrangement for the preservation and use of Presidential papers that has resulted in irreparable loss or dispersion of important bodies of Presidential documents during the 166 years of our Nation's existence. It would enable our Presidents and former Presidents to plan for the preservation of their papers at the place of their choice with the knowledge that the Government has made provision to receive them in the archives of the Nation with adequate provisions for their preservation, with proper safeguards for their administration, and with restrictions on their use that recognize and protect the President's rights." H. Rept. No. 993, 84th Cong., 1st sess. 2 (1955).

The act reflects the recognition that papers and other materials generated and collected by a President in the course of his official duties may become his personal property. We note that the Attorney General has opined, in a letter to the President dated September 6, 1974, that it has apparently been "the almost unvaried understanding of all three branches of Government since the beginning of the Republic" as reflected in "the practices of our Presidents since the earliest times" that the papers and other materials of a former President are his personal property, subject only to certain limitations directly related to the character of the documents as records of Government activity such as, for example, security classification.

Under the September 6 agreement, Mr. Nixon retains legal and aquitable title to the materials and sole control of access to and use of them for the present. He makes a gift to the Nation of the White House recordings effective

September 1, 1979, although they are all to be destroyed September 1, 1984, or at his death, whichever first occurs, and he can order any of them destroyed after September 1, 1979. He expresses his intention to donate a portion of the other materials to the Nation, after he has reviewed them.

The various restrictions on the use of and access to the materials deposited with the Administrator are very broad. However, in negotiating such agreements the Administrator, it seems clear, is to be guided by the legislative goal, which is to secure to the Nation to the extent possible the use of Presidential historical materials, and to prevent their dispersion into private hands, or their loss.

In view of this responsibility of the Administrator, and of the broad discretion given him by 44 U.S.C. 2107 and 2108(c) we cannot say that the September 6 agreement is not valid. We have no basis to assume that the Administrator did not diligently seek to achieve the statutory objectives, or that it would have been possible to negotiate an agreement more favorable to the United States, particularly since the alternative may have been that Mr. Nixon would make no deposit of the materials but rather assert his recognized right of ownership of them to the exclusion of any right of access by the United States. Accordingly, we consider the September 6 agreement to be a valid exercise of the Administrator's authority.

We trust that the foregoing is of assistance to the Subcommittee in its consideration of the pending appropriation requests.

Sincerely yours,

/s/Signature Line
Comptroller General
of the United States

Enclosures

[Caption Omitted in Printing]

INTERVENOR-DEFENDANTS' EVIDENTIARY SUBMISSION AND RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

A. EVIDENTIARY SUBMISSION

In accordance with the pre-trial order entered by this Court on June 13, 1975, Intervenor-Defendants hereby submit their evidentiary presentation. The presentation includes:

(1) Affidavits from the following individuals:

Paul Henry Nitze
Morton H. Halperin
Richard N. Goodwin*
George E. Reedy
John P. Roche
James MacGregor Burns
Peter Lisagor
James N. Naughton

*Mr. Goodwin's executed affidavit has not arrived in Washington at the time of the filing of this factual submission. Counsel for Intervenor-Defendants expect the executed affidavit to arrive shortly and will file the affidavit as part of this submission as soon as it arrives. Counsel for Plaintiff were furnished with an unexecuted copy of Mr. Goodwin's affidavit on July 29, 1975.

Robert Novak
Julian P. Boyd

(2) Letter of Elbert B. Smith, dated November 7, 1974. The parties have agreed that the stipulation concerning the affidavits described in (1), *supra,* (see p. 4, *infra*) applies to this letter as well.

(3) Copies, provided by counsel for Plaintiff Nixon on July 29, 1975, of requests made since August 9, 1974 (except for civil litigation discovery demands and grand jury subpoenas) for access to the presidential materials of the Nixon Administration, together with responses to such requests.[1]

(4) Selected portions of the record of the "consolidated cases"—*Nixon v. Sampson, et al.,* Civil Action No. 74-1518, *Reporters Committee for Freedom of the Press, et al. v. Sampson, et al.,* Civil Action No. 74-1533, and *Hellman, et al. v. Sampson, et al.,* Civil Action No. 74-1551. These record portions relate to the range of the materials included within Mr. Nixon's claims of ownership and personal privilege. Counsel for the parties have sought to frame a stipulation regarding the contents of the presidential materials of the Nixon Administration claimed by Mr. Nixon as his own, but have not succeeded in reaching agreement at the time of the filing of this submission. Counsel are continuing,

[1]In our informal discussion request to counsel for Plaintiff, Intervenor-Defendants had sought, among other things, copies of requests for access to the presidential materials of the Nixon Administration and responses thereto arising out of civil litigation. Plaintiff has not complied with this part of our request. In addition, preliminary analysis of those documents which counsel for Plaintiff did provide in response to our informal request suggests that these documents may fail to give a complete description of all requests that have been made since August 9, 1974, for access to the presidential materials of the Nixon Administration, and of all responses made thereto. It may be necessary to pursue this matter further.

however, to seek agreement on such a stipulation. The portions of the record we are now submitting are the following:

(a) Deposition of Jack Nesbitt; November 12, 1974, pp. 15-21, 27-31, 46-47.

(b) Excerpts from submission of defendants Sampson, Buchen and Knight pursuant to Court Order of November 7, 1974:

(i) Memorandum of William F. Matthews, January 12, 1974.

(ii) Description of Presidential Materials of the Nixon Administration Sent to the National Archives Building by the Office of Presidential Papers.

(iii) Memorandum: Categories of Nixon Administration Material Held by White House Security Office.

(iv) Memorandum: Categories of Nixon Administration Material Held by the National Security Council.

(v) Memorandum: Materials held in Safe Zone 128 and Room 249, EOB.

(c) Complaint of Reporters Committee, *et al.* in No. 74-1533.

(d) Answer of Intervenor-Defendant Richard M. Nixon in No. 74-1533.

(e) Transcript of Court Proceedings, October 22, 1974, pp. 114-15, 140-42.

(5) Letters dated September 5, 1974 and September 11, 1974 relating to a request by Maxine Cheshire for access to records relating to gifts from foreign heads of state to Plaintiff Nixon and his family.

* * *

Four stipulations signed by counsel for all parties to the instant case with respect to certain factual matters are being submitted by Defendants.

Intervenor-Defendants also incorporate by reference the documents included in the presidential materials of the Nixon Administration claimed by Plaintiff, as specified in the schedule to Intervenor-Defendants' Request for Admissions dated July 29, 1975; a total of 127 documents are listed here. These documents are included in *Statement of Information,* Hearings on H. Res. 803 before the House Committee on the Judiciary, 93rd Cong., 2nd Sess. (1974).

In addition, Intervenor-Defendants will rely on portions of the transcript of the deposition of Plaintiff Richard M. Nixon, taken July 25, 1975, as well as exhibits thereto and published documents identified therein. The transcript of the Nixon deposition has not been completed at the time of this filing. Intervenor-Defendants will also rely on portions of the deposition of Jeanne W. Davis taken by counsel for Plaintiff on July 30, 1975, and the exhibits thereto.

Finally, Intervenor-Defendants will refer in their brief to historical treatises, articles and materials; to government reports and publications; and to published memoirs and writings of former Presidents and their advisors.

B. RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Plaintiff has asked Intervenor-Defendants to admit certain facts with respect to his evidentiary submissions. Intervenor-Defendants respond as follows:

—Items 1-4 of the request for admissions relate to Plaintiff's affidavits. The response of Intervenor-

Defendants to these four requests is covered by stipulation of the parties dated July 30, 1975.

—Item 5 of Plaintiff's request relates to a document entitled "Description of the White House Taping System" prepared by counsel for Plaintiff. The response of Intervenor-Defendants to this request is covered by stipulation of the parties dated July 30, 1975.

—Item 6 of Plaintiff's request relates to a press release incorporating a document dated September 6, 1974, and entitled "Text of a Legal Opinion by the Attorney General." Intervenor-Defendants admit that this item is an accurate and genuine copy of the document described, but deny that the document has any further evidentiary value.

—Item 7 of Plaintiff's request relates to a study by the Library of Congress, Congressional Research Service, entitled "Ownership of Presidential Papers," and dated September 24, 1974. Intervenor-Defendants admit that this item is an accurate and genuine copy of the document described. To the extent that the document contains legal analysis or conclusions, Intervenor-Defendants deny that the document has any evidentiary value.

—Item 8 of Plaintiff's request relates to a letter sent from Elmer B. Staats, Comptroller General of the United States, to Senator Joseph M. Montoya, dated September 20, 1974. Intervenor-Defendants admit that this item is an accurate and genuine copy of the document described, but deny that the document has any further evidentiary value.

—Item 9 of the Plaintiff's request relates to the Depository Agreement between Plaintiff Nixon and Arthur F. Sampson, Administrator of General Services, dated September 6, 1974. Intervenor-Defendants admit

that this item is an accurate and genuine copy of the document described.

—Item 10 of Plaintiff's request relates to a document entitled "Direct Testimony of John Nesbitt," prepared by counsel for Plaintiff. Intervenor-Defendants' response to this request is covered by stipulation of the parties dated July 30, 1975.

Respectfully submitted

/s/Robert E. Herzstein
Robert E. Herzstein
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Attorneys for Intervenor-Defendants
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/s/William A. Dobrovir
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/s/Leon Friedman
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Lillian Hellman, *et al.*

July 31, 1975

[Caption Omitted in Printing]

AFFIDAVIT OF GEORGE E. REEDY

STATE OF WISCONSIN)
) SS
COUNTY OF MILWAUKEE)

GEORGE E. REEDY being first duly sworn deposes and says:

1. I am Dean of the College of Journalism and Nieman Professor of Journalism at Marquette University, 1131 West Wisconsin Avenue, Milwaukee, Wisconsin.

2. I was Special Assistant to the President from November, 1963 to March, 1964, and again from August, 1965 to May, 1966. I was White House Press Secretary from March, 1964 to August, 1965. I was Special Consultant to the President from March, 1968 to December, 1968.

3. I also served as Special Assistant to the Vice President from 1961 to 1963, with special responsibilities in the areas of space exploration and equal employment. From 1953 to 1960 I was Executive Director of the Senate Democratic Policy Committee. From 1951 to 1952 I served as Special Consultant to the Senate Armed Services Preparedness Subcommittee. Prior to that time I was a journalist for United Press International stationed in Washington, D.C.

4. I have written two books on the presidency: *The Presidency in Flux* (Columbia University Press, 1971) and *The Twilight of the Presidency* (The New American Library, Inc., 1970). I have also written numerous articles for *The New York Times, The Los Angeles Times,* and *The New Republic.* I am presently preparing another book on the political process.

5. As Press Secretary to President Johnson, it was part of my duties to attend substantially all of the relatively formal meetings involving the President, such as National Security Council meetings, Cabinet meetings and meetings with the legislative leaders. In addition, I attended most special meetings involving the President, including substantially all such meetings which were attended by groups of two or more persons in addition to the President himself. Such meetings related to his political role as well as those related to his governmental role as Chief Executive.

6. Such extensive involvement in the daily activities of the President, and in his meetings with members of the White House staff, governmental officials, members of Congress, and private groups and individuals is essential to the conduct of the Press Secretary's functions, in order to assure that he reflects an accurate grasp of the workings of the White House in his exchanges with the press. The Press Secretary's regular attendance at such meetings is also essential in order to inform participants in the meetings of the likely reactions of the press to various proposed courses of action under consideration.

7. As Special Assistant, Press Secretary, and Special Consultant, I regularly advised President Johnson on a variety of issues including especially the treatment of minorities, labor matters, Selective Service and communications. As Press Secretary, I also advised the President concerning dealings with the press.

8. Most group meetings would be known in advance to the press. Usually they would be placed formally on the President's schedule and publicly announced, large because it is not, as a practical matter, possible to prevent the White House press corps from discovering that particular groups are meeting with the President. In the large majority of instances, with the exception of the National Security Council, the subject matter of Presidential meetings was also announced in advance; such advance notice resulted from the likelihood that knowledge of the content of the meetings would quickly become known to the press, even if no formal announcement of the subject matter was made.

9. There were a number of mechanisms by which the statements made and positions and actions taken at such meetings were transmitted to the press and the public:

A. Following meetings with the President, it was normally the practice that a briefing would be provided to the press, usually conducted by the Press Secretary, summarizing the discussions and decisions reached at the meeting in question.

B. A considerable amount of the background information about Presidential decisions and activities—in my judgment, 50% to 60% of the real news of such activities—was not communicated to the press through formal briefings, but through informal contacts originated by the President or by other participants in White House meetings. Such communications often reflected what could be called "controlled leaks"—that is, informal briefings by officials other than members of the Press Staff to one or more representatives of the press, often on a "background" or not-for-attribution basis—at the instance of the President or other advisers. Such informal communications generally included significantly more detail as to the role played and position taken by a

particular individual than did the formal briefings. Generally, the participants in meetings with the President played little or no role in the determination of what information to impart through controlled leaks.

C. In addition, a considerable amount of similar information reached the press from informal and unauthorized leaks by other participants in such meetings. Such leaking was a frequent factor in the process of policy-making within the White House. It was also employed at times to serve the career interests or policy views of the particular individual responsible for a given leak.

10. Apart from information about communications involving the President which was made available to the press more or less immediately, a considerable amount of information, often involving highly sensitive areas of national policy, reached the public very soon after the end of the Johnson Administration. Some of the examples of books which have revealed positions of various presidential advisers on sensitive issues are David Halberstam's *The Best and the Brightest* (1972) and President Johnson's own memoirs *The Vantage Point* (Holt, Rinehart & Winston, 1971).

11. Only a very naive author of a written communication involving the President would expect such a communication to remain confidential, especially on an indefinite basis. Apart from the possibility that such communications might be immediately disseminated, or "leaked," to the press, it was understood that President Johnson had the intention of placing all papers relating to his Presidency in a library to be made publicly available at the earliest possible opportunity. An oral communication to the President, with no one else present in the room, had a better chance for temporary confidentiality

but no man or woman of prudence would count on indefinite confidentiality.

12. Based upon my experience, because of all of the above avenues by which information can become public, persons involved in internal communications with the President, including myself, had no assurance or expectation of confidentiality, especially on an indefinite basis. I do not believe this was an inhibiting factor in advice to the President, however, as the risk of disclosure is merely a normal factor in political dialogue which mature people weigh and discount as a normal condition of their activity.

/s/George E. Reedy
George E. Reedy

Subscribed and Sworn to Before me
this 24th day of July, 1975.

/s/Lila Henschel
Notary Public
My Commission expires 1/9/77.

[Caption Omitted in Printing]

AFFIDAVIT OF PAUL HENRY NITZE

COUNTY OF ARLINGTON)
) ss:
COMMONWEALTH OF VIRGINIA)

PAUL HENRY NITZE, being first duly sworn, deposes and says:

1. I have for thirty-five years been actively involved, both in and out of government, in the study

and conduct of American foreign and military policy, and have occupied positions in the Administrations of Franklin D. Roosevelt, Harry S. Truman, Dwight D. Eisenhower, John F. Kennedy, Lyndon B. Johnson, and Richard M. Nixon.

2. During World War II, my work included service with the Office of Coordinator of Inter American Affairs, Board of Economic Warfare, Foreign Economic Administration and as Director and then Vice Chairman of the United States Strategic Bombing Survey. From 1946-1949, I served as Director of the Office of International Trade Policy and Deputy Assistant Secretary for Economic Affairs and from 1950-1953, as Director of the Policy Planning Staff in the Department of State. From 1961-63, I served as Assistant Secretary of Defense for International Security Affairs, and subsequently (1963-67) as Secretary of the Navy, and (1967-69) as Deputy Secretary of Defense. From July, 1969 until June, 1974, I served as a member of the United States delegation to the Strategic Arms Limitation Talks with the Soviet Union.

3. Outside of government, I have served as President of the Foreign Service Educational Foundation, as Chairman of the Advisory Council of the School of Advanced International Studies at Washington, D. C. and as a Trustee of Johns Hopkins University.

4. While serving as Assistant Secretary of Defense for International Security Affairs, I was responsible to Mr. McNamara for the coordination of U.S. Defense Policy with U.S. Foreign Policy, working with the State Department, the White House, the NSC and the other pertinent parts of the Executive Branch. In addition, President Kennedy had personally asked me to take an active role in certain matters having to do with arms control and with France. In late 1961 and early 1962,

one of the difficult national security issues we faced concerned the efforts of the French Government under President DeGaulle to raise doubts about the reliability of the American nuclear deterrent, with respect to Soviet threats to the security of Western Europe. Such doubts were invoked to justify the French policy of establishing a national nuclear striking force, termed the "Force de Frappe." A major objective of United States policy was to discourage the proliferation of nuclear weapons into the hands of additional national governments.

5. During the above period, it was alleged by the French Government that, during the Suez crisis in 1956, when Soviet Premier Khrushchev had publicly threatened a nuclear missile strike against French and British cities if the Suez operations were continued, the United States Government had failed to support the French and British. The French alleged that in 1956 the United States Ambassador to France, C. Douglas Dillon, had been personally asked by the French Prime Minister, Mr. Guy Mollet, whether the United States would commit its own intercontinental nuclear force to counter such a Soviet threat against France, even though the situation provoking the crisis was located outside the boundaries to which the NATO Agreement, strictly construed, pertained. The French alleged that the United States had not in 1956 provided firm assurance that its allies could count on the full support of the United States under the circumstances.

6. Mr. Dillon, who in 1961 was serving as Secretary of the Treasury, had told me and others that he had in 1956 given the French Prime Minister firm assurances that the United States nuclear deterrent could be counted upon to support its Western European allies in the face of any nuclear threat from the Soviet Union, including any such threat to France arising from the Suez

incident. Although Mr. Dillon recalled sending a reporting telegram to Washington on this subject, it could not be located in the State Department files.

7. There was, of course, no question on the part of myself, or any other concerned officials, as to the accuracy of Secretary Dillon's recollections regarding the statement of the American position given by him to the French Prime Minister in 1956. Nevertheless it appeared desirable to obtain such written records as had been made by our government at the time of the disputed events. As a result, Dr. Timothy Stanley, then serving as my Special Assistant and who had also served as Special Assistant to my predecessor in that office during the closing years of the Eisenhower Administration, was directed to request Secretary Dillon's report on the Suez incident and such other pertinent records of the American position as might be available in former President Eisenhower's papers. As is noted in the affidavit of John S. D. Eisenhower (¶ 23) submitted to the District Court June 30, 1975, on behalf of former President Nixon, and in Exhibit B to Mr. Eisenhower's affidavit, Dr. Stanley telephoned Mr. Eisenhower to request the materials in question from former President Eisenhower's papers. As Mr. Eisenhower indicates in Exhibit B to his affidavit, Dr. Stanley did not insist on making the necessary search of former President Eisenhower's papers himself, but stated to Mr. Eisenhower that it would be acceptable for those in charge of the Eisenhower collection to retrieve the materials.

8. Upon being informed, as is recounted in Mr. Eisenhower's affidavit and Exhibit B thereto, that the materials sought could not be obtained except through a personal request from Secretary McNamara to former President Eisenhower, Dr. Stanley reported back to me. It is my recollection that I took the matter up with Secretary McNamara and that after some consideration,

taking account of the delicacy which then marked relations between the new Administration and the former President, and considering also the need which the new Administration had discovered to make a variety of requests of the former President, including requests for his support on certain important current foreign policy decisions, it was determined not to pursue this matter further. The decision was that, although the question of the credibility of the American deterrent, especially regarding our West European allies, was of high significance, and although the matter of the American response to Soviet nuclear threats in 1956 bore centrally on this issue, it would nevertheless have to be sufficient to rely upon Secretary Dillon's statement of his recollections, in view of the general importance of minimizing the number of occasions on which the Administration would make a request of former President Eisenhower. Hence, the decision was made to proceed without written record of the American Government's official responses to the issuance of Soviet nuclear threats during the 1956 Suez crisis.

9. I have reviewed the affidavit submitted by Mr. John S. D. Eisenhower in support of former President Nixon and Exhibit B thereto. I note Mr. Eisenhower's observation in Exhibit B to the effect that if the issue "truly involves national security (which seems highly doubtful)," that Secretary McNamara could therefore request of former President Eisenhower permission to send a representative to him to demonstrate the legitimacy of the request. I would have here to emphasize that the decision not to pursue the matter further was not made because it did not "truly involve national security." Nor did this decision reflect any judgment on our part that it is not essential to preserve written records of major commitments and actions taken in the field of

national security policy. On the contrary, the continuity of government requires that officials have at hand the written record of past commitments and actions taken on behalf of the nation by its highest officials. Access to materials restricted on national security grounds should be confined to officials properly cleared, and to those who properly require such access. But on the basis of my experience, it would be my judgment that it is not in the nation's best interests to require personal intervention of the highest officials, such as the Secretary of Defense, to obtain access to such materials. Nor should access to critical records be conditioned on the outcome of what are in effect negotiations with former chief executives exercising personal dominion over such records.

/s/Paul Henry Nitze
Paul Henry Nitze

Subscribed and sworn to before
me this 17 day of July, 1975.

/s/Barbara E. Goodwyn
Notary Public

My Commission Expires 5-8-77.

[Caption Omitted in Printing]

AFFIDAVIT OF MORTON H. HALPERIN

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

MORTON H. HALPERIN, being first duly sworn, deposes and says:

1. I have since 1960, when I completed my doctorate at Yale University, been actively engaged in the study and in the conduct of foreign and military policy. From 1960-1966, I was associated with Harvard University's Center for International Affairs and was an assistant professor of government at Harvard University. From 1966-1970, as I discuss below, I served in the Department of Defense and on the staff of the National Security Council in the White House. From 1970-1973, I served as a Senior Fellow at the Brookings Institution. I am currently Director of a Project on National Security and Civil Liberties jointly sponsored by the Center for National Security Studies and the American Civil Liberties Union Foundation.

2. Since 1960, I have published many articles dealing with national security policy in scholarly and other journals, as well as several books, including *Strategy and Arms Control* (with Thomas C. Schelling) (Twentieth Century Fund, 1961), *Limited War in the Nuclear Age* (John R. Wiley & Sons, 1963), *China and the Bomb* (Praeger, 1965), *Bureaucratic Politics and Foreign Policy* (Brookings, 1973), *National Security Policy-Making* (D. C. Heath, 1975).

3. From 1966-1969, I served in the Department of Defense. Beginning in 1967, I was Deputy Assistant Secretary of Defense in the Office of International Security Affairs. In this capacity, I originally reported to Assistant Secretary of Defense for International Security Affairs John T. McNaughton and, after his death, to his successor, Paul C. Warnke. My areas of responsibility during this period included planning for the preparation of the Strategic Arms Limitation Talks ("SALT"), overall responsibility for the production of a history of United States–Vietnamese relations, subsequently known as the "Pentagon Papers," and United States–Japanese relations.

4. In December 1968 and January 1969, I was requested by Henry A. Kissinger, who had been appointed by President-elect Richard M. Nixon to be his Assistant for National Security Affairs, to assist in transition planning in the national security area for the incoming Administration. My work included planning for the establishment of a new National Security Council administrative system, determination of which Presidential directives issued through the National Security Council under past Administrations should be permitted to remain in effect under President Nixon, planning for the SALT discussions, and the preparation of papers concerning the status of Vietnam policy and strategic forces.

5. From January 1969 through September 1970, I served as Assistant for Planning on the staff of the National Security Council under Mr. Kissinger. My responsibilities, in addition to the substantive areas noted in paragraph 4 above, included the preparation of the briefing books used by Mr. Kissinger and President Nixon at the weekly meetings of the National Security Council.

6. On January 20, 1969, when members of the incoming National Security staff reported to work, we discovered that, except for certain central files of former National Security Council "Decision Documents" and personal files of officials remaining on the National Security Council staff, no National Security Council files remained on the premises. All safes which had formerly contained highly restricted material were empty.

7. In connection with my responsibilities during the transition period and as a member of the National Security Council staff, regarding the initiation of SALT negotiations, it was necessary to determine the status of discussions on this subject between the outgoing President and Soviet leaders. In particular, it was important

for the new Administration, in planning its initial negotiating posture, to understand the nature of initiatives to the Soviet Union made by the Johnson Administration during late 1968 and early 1969 concerning SALT. Members of the incoming National Security Council staff were made aware that, in the closing weeks of the Johnson Administration, President Johnson had caused to be delivered to Soviet Ambassador Dobrynin a proposed statement of principles intended to establish a framework for the conduct of negotiations to limit nuclear arms. It was the intention of the Johnson Administration to arrive at an understanding with the Soviet Union regarding such a statement of principles and publicly to announce that such an understanding had been reached between the two countries, before the end of the Johnson Administration. Negotiations with Ambassador Dobrynin concerning this proposal had been conducted by White House officials. Ultimately, the negotiations were unsuccessful, as the Soviet leadership decided not to proceed on SALT before the accession to power of the New American Administration.

8. No copies of the relevant materials recording these pre-SALT negotiations by the Johnson White House were evident in files of the State Department or of other agencies. Nor were such records contained in any of the files available to the National Security Council staff in the White House. It was understood that all copies of such materials had been taken from the White House by President Johnson. A review of cable traffic during the closing weeks of the Johnson Administration revealed a directive to the United States Ambassador to the North Atlantic Treaty Organization to discuss with leaders of member countries certain principles for limiting nuclear arms. The conclusion of the new National Security Council staff was that principles stated in the cable to the

NATO Ambassador must have resembled the proposal given to Ambassador Dobrynin.

9. As the above discussion indicates, in my experience and judgment, it is inimical to the best interests of assuring continuity in the conduct of national security policy for policymakers not to have ready access to the records of the commitments and other actions taken by the President and other high officials under previous Administrations. For example, in the case discussed above, the occurrence of President Johnson's unsuccessful pre-SALT negotiations was known to the new Administration only because the new Administration contained certain individuals who had been involved in the making of national security policy during the Johnson Administration. Under other circumstances, the results could have differed. For example, in 1961, the incoming Kennedy Administration National Security Council staff included few holdovers from the Eisenhower staff. The absence of files such as those containing the record of the Johnson SALT initiative could then have meant that the new Administration would have no knowledge whatsoever that such an initiative had been undertaken.

10. Another important example of the potential handicap that may be imposed upon national security policymakers by depriving them of ready access to copies of pertinent records from past Administrations occurred very recently. In early April 1975, it was publicly charged, by Senator Henry Jackson, among others, that, prior to the signing of the Paris Accords in January 1973, President Nixon had given South Vietnamese President Thieu secret assurances, not disclosed in the documents of public record, to the effect that the United States would take strong military action to counter certain North Vietnamese violations of the ceasefire agreement.

Subsequently, on April 30, 1975, a member of President Thieu's cabinet released to the public letters from President Nixon dated November 14, 1972, and January 5, 1973, which showed that such commitments had in fact been given to President Thieu. On April 15, 1975, I wrote to the Department of State and the National Security Council requesting, *inter alia*, copies of letters from President Nixon to President Thieu indicating what the United States would do if there were violations of the Vietnam ceasefire agreement. The Department of State advised me that it was releasing in whole or in part all the documents in its possession. The documents released did not include any of these letters. The National Security Council advised me that the letters could not be released since they were part of the Nixon papers. Copies of my letters to the Department of State and the National Security Council, together with the replies to these letters and my responses to the replies, are attached as exhibits to this affidavit.

11. On the basis of my experience, it would be my definite judgment that it would be essential for national security policymakers to be aware of and to have access to commitments such as those evidently made by President Nixon to President Thieu in this case. Since the only records of President Nixon's commitments were treated by him and by the government as included within his Presidential materials, it would appear that, but for the statute under consideration in this case (Pub. L. No. 93-526) and the order of the United States District Court for the District of Columbia, issued October 22, 1974, in *Nixon v. Sampson, et al.* (C.A. No. 74-1518), temporarily restraining Mr. Nixon from removing his Presidential materials from Washington, access to records of these commitments, by government officials as well as by the public, would have been lost except insofar as Mr. Nixon was willing to make the records available. I believe it is

proper for Presidents and other high officials to take with them for their own records—but not for inappropriate or indiscriminate disclosure and use—*copies* of documents for which they were responsible. However, by no means, should Presidents and other high officials be in a position to deprive future Administrations of ready access to the record of their own actions taken on behalf of the United States. In my opinion, leaving that prerogative with a former President does not best serve the conduct of national security policy.

/s/Morton H. Halperin
Morton H. Halperin

Subscribed and sworn to before
me this 17 day of July, 1975.

Mary L. Coyle
Notary Public

My Commission Expires Nov. 14, 1978

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES MACGREGOR BURNS

STATE OF MASSACHUSETTS)
) ss:
COUNTY OF BERKSHIRE)

James Macgregor Burns, being duly sworn, deposes and says as follows:

1. I am Woodrow Wilson Professor of Political Science at Williams College, Williamstown, Massachusetts,

and President-elect of the American Political Science Association and have written a book, Presidential Government, dealing with the power of the presidency.

2. The White House has changed enormously as an institution since the last century, and even since Franklin Roosevelt's time. The individual presidency has come to be absorbed in the broader White House bureaucracy, just as that White House bureaucracy has tended to take over one-time semi-autonomous institutions, such as the Cabinet, the Vice Presidency, the independent regulatory commissions, and the like. The President is *primus inter pares,* but a great deal of decision-making emerges from the interplay of the large personal and institutional staff around the President. It might have been appropriate some time back for a President to claim personal possession of materials and documents emanating from a small White House, but today the documents are essentially "institutionalized."

3. This institutionalization and depersonalization of White House materials means that a large number of people have a vital and specific interest in those materials. There is an extensive "civil service" in the White House that goes on from administration to administration. When a President leaves or dies in mid-term, there are countless policymakers in the White House who continue to have a heavy dependence on the availability of Presidential documents. Sometimes, indeed, the best communication in the White House takes place through the availability of recent documentary material.

4. Scholars are particularly concerned about the quick access to White House materials because of what has been called the "speeding up of history" or the "acceleration of history." At one time, in the world of diplomacy and war and economic policy and the like, it was feasible to wait some time before having access to the

documents, because there were long periods of time between wars and between depressions or economic crises. But the 20th century, with its repeated crises of increasing frequency, the development of transportation and communication, and the increasing interdependence of nations, has produced a situation in which the time is very short for scholars, reporters, and analysts of various sorts to get to documentary material. We simply cannot wait the decade or two or three that it was possible to wait some time ago, when nations could ponder at some leisure the lessons of the most recent depression, war, foreign policy confrontation, or other crises. Hence, we cannot wait while Presidents make leisurely decisions as to the disposition of their papers. And, on all counts, the threat of Presidential destruction of papers is most serious.

/s/James MacGregor Burns
James MacGregor Burns

Subscribed and sworn to before me, a Notary Public, this 17th day of December, 1974.

/s/Carol A. Gleason
Notary Public

My Commission Expires
March 14, 1980

[Caption Omitted in Printing]

AFFIDAVIT OF PETER LISAGOR

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

PETER LISAGOR, being first duly sworn, deposes and says:

1. I am Washington Bureau Chief of the *Chicago Daily News* and have served as the White House correspondent of my paper going back to the Administration of Dwight D. Eisenhower.

2. In this capacity, I have had countless conversations with advisers and staff assistants of Presidents Eisenhower, Kennedy, Johnson, Nixon and Ford, as well as with Cabinet officers, who related discussions they had with the President, advice given him, and positions taken by other advisers.

3. It is not uncommon for one adviser to describe on a "background" basis the position he and other advisers have taken on issues as critical as national security matters and as commonplace as domestic decisions. During the Cuban Missile Crises of 1962, for example, advisers to President Kennedy discussed their own and opposing positions. Other examples of this practice in my experience included the landing of Marines in Lebanon in 1958, the decision to bomb North Vietnam in 1965, the decision to mine Haiphong harbor in 1972, the decision to dispatch force to free the *Mayaguez* freighter and crew from the Cambodians in 1975, to cite a few.

4. This is a time-honored practice for communications between the press and White House advisers. It is pursued for a variety of reasons, including a genuine

desire to explain the rationale for Presidential actions, to promote the source's own substantive views and purposes, to explain the divergent options available to the President, to portray the source as a fount of superior wisdom and judgment, and to reflect the constant struggle for influence within the White House.

5. It would be an exaggeration to claim that no confidentiality—or respect for its need among newsmen—exists or that every exchange between the President and his advisers automatically becomes a matter of public knowledge immediately. However, the practice is widespread enough to make unrealistic the claim that advisers to the President can function with the expectation that their positions will not eventually become public.

/s/Peter Lisagor
Peter Lisagor

Subscribed and Sworn to Before
me this 17th day of July, 1975

/s/[Illegible]
Notary Public

My Commission Expires January 1, 1980.

[Caption Omitted in Printing]

AFFIDAVIT OF JAMES M. NAUGHTON

CITY OF WASHINGTON)
) ss:
DISTRICT OF COLUMBIA)

JAMES M. NAUGHTON, being first duly sworn, deposes and says:

1. I am the White House correspondent for *The New York Times* and have been in this position since May 5, 1975. Prior to that time, I was the Assistant White House correspondent for *The New York Times* from October, 1969 to January, 1972. From January, 1973 to May, 1975, I was the Congressional correspondent for *The New York Times.* I have been a reporter on national affairs for *The New York Times* since July, 1969.

2. In my capacity as White House correspondent for *The New York Times,* I have written news articles frequently that described activities and deliberations of the President of the United States, his staff and the Cabinet in the formulation of governmental policies. These articles have reported numerous conversations between the President and members of the White House staff, the Cabinet departments, the leaders and members of Congress and outside advisors to the President.

3. There is, obviously, considerable confidentiality of deliberations in the White House. However, disclosures by one advisor or another, or by the President himself, of the nature and the details of policy deliberations are, in fact, a useful part of the governmental function in Washington and are recognized as such by both officials and reporters. It is quite common for those who engage in conversation with the President to "leak" to reporters information regarding specific discussions in which they

have participated or which they have observed. It is not unusual—in fact, it is common—for one advisor to relate to me and to other reporters for publication the nature of advice another advisor has given to the President. Interviews of this sort are a regular source of material for news articles that have been, are and will inevitably continue to be written by me and by others who cover the White House. To pretend that such practices do not occur or that they do not serve a desirable purpose on both sides is to feign ignorance of the manner in which a free press operates or, more serious, to attempt to frustrate that process by limiting available information to "official" pronouncements which, recent history has shown, can be at best misleading and at worst deliberately false.

No one would deny that there are matters which a President and his advisors would prefer to keep confidential for whatever motive, personal or political, substantive or supercilious. But it would seem obvious to any student of the so-called Watergate scandals that the risks of excessive Presidential secrecy far outweigh any imagined or real perils posed by breaches of White House confidentiality. To proclaim that government information is the property of the public official rather than of the public would be to refute the concept of openness that has been enshrined for two centuries in our Constitution—and paid homage, however sincerely, by virtually every candidate who has sought election to national office.

4. However haphazard and, for a reporter, unsatisfactory are the methods by which Presidential deliberations are made known, the fact is that they customarily are. Often this is because it suits the purpose of the White House, Cabinet or Congressional officials, for reasons such as these:

—to advance a particular view by influencing the reporter's story and the information the reporter has available in a manner which the official believes to be consonant with the best interests of the country, his particular office or his own personal political fortune;

—to test public opinion on a particular policy option, i.e., to float a "trial balloon;"

—to enlighten the public as to the considerations that underlay a particular policy determination and thus attempt to further public consent;

—to influence the course of an election;

—to maintain or to advance an official's own position in any political skirmishing within the policy levels of an Administration.

The practices discussed below should help to demonstrate that in the real world of government no one who communicates with the President on a matter of public concern can—one might also say should—do so with the assurance that the advice will not be disclosed to the public at some point:

5. In the period that I covered the White House during the Nixon and the Ford Administrations, it was by no means rare to obtain from White House and other officials descriptions of Cabinet meetings or policy discussions that, depending on the purpose of the official or the ability to protect the source of information from disclosure, ranged from tidbit to detailed chronology.

(a) On one of my first assignments as a national affairs correspondent for *The New York Times,* I was one of two reporters to obtain from an official of the Department of Health, Education and Welfare a detailed account of the outcome of policy disputes over the shape of a welfare reform proposal made in August, 1969 by President Richard M. Nixon. The

details were provided several days prior to the official announcement of the proposal and included information on how the President had resolved conflicting views of principal advisors on the issue. The other reporter, then working for the National Broadcasting Company, was coincidentally, Ron Nessen, now the Press Secretary to President Gerald R. Ford.

(b) Throughout the Nixon Administration, certain White House officials regularly provided to me and to other reporters anecdotes about President Nixon's meetings with the Cabinet and various other officials and individuals. Invariably, these anecdotes cast President Nixon in a favorable light.

(c) An advisor to President Nixon confided to me on September 30, 1969, on a matter of obvious sensitivity to the White House, that it was the President who decided that the United States Army should not pursue criminal prosecution of six Green Beret soldiers accused of murdering a South Vietnamese intelligence agent. Then-White House Press Secretary, Ronald L. Ziegler, who had denied any Presidential role in the decision, confirmed it the following day after the disclosure in *The New York Times.*

(d) On February 20, 1970, *The New York Times* published an account which I wrote on the basis of information provided by several White House officials of the manner in which President Nixon prepared the first State of the World message to the Congress. The news article contained examples of phrases and words that had been rewritten by such advisors as Henry A. Kissinger, then the President's advisor on national security, with the objective of persuading Americans to eschew an isolationist attitude toward world affairs.

(e) Another instance of a purposeful White House "leak" involved the efforts of several White House officials in January, 1971 to let me and other reporters know of President Nixon's private "jawboning," i.e., confrontation, of steel industry executives in order to reduce the extent of steel price increases.

(f) On October 23, 1973, *The New York Times* published a long, detailed description—including quotes of such individuals as then-Attorney General Elliot L. Richardson—of the private events and maneuvers which led to the resignation of Spiro T. Agnew from the Vice Presidency. The account, which I compiled with the assistance of four colleagues, contained, among other things, comments from Administration officials on the role that President Nixon played in hastening his Vice President's resignation.

(g) A number of White House officials provided me with information for a May 26, 1975 article in *The New York Times* about President Ford's plans to develop a domestic "agenda for the future" that would reflect a politically conservative approach to government programs. The article told, among other things, how a conversation between President Ford and James Q. Wilson, a professor of Government at Harvard University, about law enforcement had spawned the President's subsequent proposal that repeat criminal law violators be given mandatory prison sentences on conviction. A White House official volunteered an account of the private discussion and neither the President nor Professor Wilson objected to its disclosure.

6. Members of Congress are among the most generous sources of information on their meetings, and those of their colleagues, with Presidents. The Republican and Democratic leaders of the Senate meet almost daily with

reporters a few minutes before the Senate convenes—in what is known among the reporters as "dugout chatter"—to answer questions that frequently deal with their advice to the President. That this practice and others are common and accepted forms of transacting exchange of information about Presidential meetings is best reflected in the White House tradition of presenting the Republican leaders of both the Senate and the House of Representatives to brief reporters after each of the leaders' regular private meetings with the President. There are other examples:

(a) Members of Congress disclosed, and I wrote in *The New York Times* onApril 26, 1971, that Representative Olin E. Teague, Democrat of Texas, was consulted by President Nixon as to whether Representative Teague believed Army Lieutenant William L. Calley had been sentenced to an unduly harsh punishment—life imprisonment—for the murder of South Vietnamese civilians at the hamlet of My Lai. The Congressional sources also related that Mr. Teague had told the President the sentence should be lighter and that the President asked Representative Teague to encourage that view among other leading members of the House of Representatives.

(b) Literally dozens of members of Congress gave reports, some of them from handwritten notes, to me and other reporters after having taken part in private meetings with President Nixon in November, 1973 about the Watergate case. The private White House meetings, which were described as "Operation Candor," seemed intended to leak Mr. Nixon's replies to published allegations about his conduct. The resulting news accounts, including mine, were replete with direct quotes from the President, such as his remark that he had undergone "seven months of pure hell over Watergate."

(c) In an interview I conducted with Senator Robert C. Byrd of West Virginia, the Senate Democratic Whip, in November, 1974, he volunteered (and I subsequently wrote) that President Ford had telephoned him in August, 1974 to solicit a recommendation on whom the President should nominate to be Vice President. Senator Byrd went on to recall his own verbatim advice to the President on a matter of evident national importance: "I can tell you right now my suggestion—Nelson Rockefeller."

7. Individuals who do not serve in government, but who take part in policy deliberations or discussions with Presidents, frequently make known the nature and details of such conversations, without apparent objection by the White House.

(a) Irving Kristol, Professor of Urban Values at New York University, confirmed in an interview with me which was cited in an April 12, 1970 article in *The New York Times* that he had discussed the causes of and possible remedies for domestic radicalism with President Nixon over dinner in the White House a month earlier. Professor Kristol and a White House official each recounted a discussion in which the President and the professor had drawn parallels between young middleclass Americans who resorted to violence and the Narodniki, young Russian aristocrats who murdered a 19th century czar.

(b) On June 23, 1975, *The New York Times* published a news article in which I recounted details of private meetings between President Ford and seven of his most trusted acquaintances outside government who comprise his "kitchen cabinet." I was told of the existence of the group of unofficial consultants by a White House official. Other White House officials described the nature of conversations that ranged over

political and policy matters. Several of the members of the "kitchen cabinet" told me of the candor with which they advised the President and some cited specific details. There was no suggestion by either the officials or the "kitchen cabinet" members that disclosure of the information would destroy their effectiveness or jeopardize the free flow of candid advice to and from the President. Indeed, several White House officials said, following publication of the article, that they thought the disclosure had been beneficial to the President by revealing some of the steps he had taken to try to prevent being isolated from critical, unofficial dialogue.

8. Some of these instances were obviously intentional efforts by the participants in deliberations to inform the press, with the consent of all the participants. Others, however, involved participants in deliberations disclosing the positions of other advisors without the consent of these advisors. My experience is that the fact that such information that some of the parties do not intend to disseminate is disclosed with such frequency indicates that participants in the deliberative process are aware of the likelihood that their positions may be subject to disclosure.

/s/James M. Naughton
James M. Naughton

Subscribed and Sworn to Before Me
this 11th day of July, 1975.

/s/Connie Eblatin
Notary Public
7/14/79

[Caption Omitted in Printing]

AFFIDAVIT OF JULIAN P. BOYD

STATE OF NEW JERSEY)
) ss:
COUNTY OF MERCER)

Julian P. Boyd, being duly sworn, deposes and says as follows:

1. I am editor of The Papers of Thomas Jefferson.

2. As a young lawyer traveling the Virginia circuits, Thomas Jefferson spent most of his time collecting and transcribing manuscript laws because he knew even then that "time and accident are committing daily havoc on the originals deposited in our public offices." As Governor of Virginia, as Minister to France, and as Secretary of State, Jefferson exhibited the same deep-seated concern for the preservation of public records. In consequence, almost the only documents produced by him in these offices that are not now available in state or federal archives are part of his file copies of letters written by him as governor.

3. During his two terms as President, Jefferson was extremely meticulous in depositing in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of public business or being in any sense official in nature. As a result, the vast bulk of records of an official nature generated during Jefferson's presidency are still to be found in the various departmental record groups in the National Archives. Many of these could be regarded as personal papers and, under some other presidents, probably would have been. Being profoundly convinced that, as he put it late in life, "it is the duty of every good citizen to use all the opportunities which

occur to him for preserving documents relating to the history of our country," Jefferson unquestionably employed every opportunity offered by the presidency to see to it that the public records of the office remain in public custody.

4. While no exact statistical tabulation can be made of the relative amounts of personal papers that Jefferson took with him on leaving office and those of a public nature that he left in the departmental offices, my estimate of the ratio of the size of the two categories would be about in the order of one to fifty. This is a conservative estimate. It should be noted that, for his own convenience and protection, Jefferson retained *copies* of a good many official records, especially his notes and rough drafts of messages to Congress, proclamations, communications with departmental heads, and so on. But in all cases, so far as I know, the *originals* of these official documents are to be found among our public records as left there by him.

5. So far as I know, Jefferson never stated the principle which underlay this consistent practice. Perhaps this was because he considered it to be a self-evident proposition that, in our system, public records are public property. His consistent practice exemplifies the principle upon which he acted.

/s/Julian P. Boyd
Julian P. Boyd

Subscribed and sworn to before me, a Notary Public, this 8th day of December 1974.

/s/Margaret S. Harrell
Notary Public

My Commission Expires July 20, 1977

MEMORANDUM

THE WHITE HOUSE
Washington

March 7, 1973

MEMORANDUM FOR THE RECORD

FROM: WILLIAM F. MATTHEWS

SUBJECT: Disposition of Files in Central Files

The following listed boxes of correspondence were shipped to The National Archives today to be stored until the President's Library is available:

Description of Box	Quantity Stored
Task Force on Rural Development	2 Boxes
Task Force on Improving the Prospects of Small Business	2 Boxes
Task Force on Mentally Handicapped	1 Box
Task Force on Prisoner Rehabilitation	1 Box
Task Force on Air Pollution	2 Boxes
Task Force on Aging	3 Boxes
Task Force on Physically Handicapped	2 Boxes
Task Force on Science Policy	1 Box
Task Force on Low Income Housing	1 Box
Task Force on Business Taxation	1 Box
Task Force on Urban Renewal	1 Box
Task Force on Higher Education	1 Box
Task Force on Oceanography	1 Box
Task Force on Economic Growth	1 Box
Task Force on Highway Safety Mobility without Mayhem	1 Box
Blue Card Cases—Copies, etc.	3 Boxes
Children's Vietnam Mail—Ack. PK 44	4 Boxes

Miscellaneous Form Letters, etc.	4 Boxes
Abortion-Pro and Con-Pro Population	1 Box
Vietnam Mail—Ack. by cards PK 37	1 Box
Tax Credit for non-public schools	1 Box
Election Congrats and other subjects—Ack. by PK 37 and PK 38	1 Box
OEO Phasing Out	4 Boxes
Letters against injunction of United Farm Workers, Boycott-1972-letters and telegrams re acquisition of Caribair by Eastern Air Lines	1 Box
Oversize Attachments - 10070 - 10177	(16 Large Boxes (34 Regular Boxes
	91 Boxes

Description of Presidential Materials of the Nixon Administration Sent to the National Archives Building by the Office of Presidential Papers.

WHITE HOUSE CENTRAL FILES. Materials shipped by W.F. Matthews. See attached.

WHITE HOUSE STAFF OFFICE FILES. Staff office files, usually of a large quantity, which were inventoried and packed by the Office of Presidential Papers. A copy of the inventory was sent to White House Central Files for their records.

COMMISSIONS, COMMITTEES, BOARDS, ETC. These are the files of a Presidential commission, committee, or board whose records were considered Presidential property.

COUNCIL OF ECONOMIC ADVISERS. We understand that under prior administrations, each Chairman and member of the Council removed the papers held in his office when he departed. During the Nixon Administration the papers of the Chairman and the members were considered to be Presidential Materials.

WHITE HOUSE PHOTO OFFICE. Material shipped to the National Archives after the resignation for proper temperature and humidity controls. It includes negatives, contact sheets, and assorted prints.

WHITE HOUSE GIFT UNIT. Some personal gifts to the First Family were sent to the National Archives for storage.

Categories of Nixon Administration Material Held by White House Security Office.

—*Investigative files*—containing correspondence, memoranda and notes pertaining thereto. They include:

Potential White House Complex Pass Holders
Proposed Presidential Appointees
Presidential Guests, including entertainers and various individuals who may have had contact with the First Family through social events, appointments, etc.

—*Subject files*—Departments and agencies of the Federal Government, White House, Executive Office of the President, Boards, Commissions; Security files.

—*Card Index*

Categories of Nixon Administration Material Held by National Security Council.

—Memoranda to the President for his information, review, and decision, including proposed Presidential decisions and instructions.

—Memoranda of conversation between the President and foreign Heads of Government/State and other foreign dignitaries including, but not limited to Foreign Ministers and other Cabinet officers, Ambassadors and Special Emissaries.

—Records of appointments and meetings with U.S. Cabinet officers and other officials pertaining to national security matters.

—Intelligence reviews, reports and analyses pertaining to national security affairs.

—Defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure.

—Telegrams originating in the White House dispatched to foreign governments, U.S. ambassadors, and force commanders relating to foreign policy and national security decisions.

—Sensitive incoming cable traffic associated with negotiations, plans, evaluations, and the impact of decisions taken on national security.

Materials Held in Safe Zone 128 and Room 429, EOB

SAFE ZONE 128

– 888 original tape recordings of conversations and 60 to 75 copies.

ROOM 429

This room contains the following materials:

– 15 boxes of domestic Gift records.

– 13 boxes of President Nixon's personal files, letters A M.

– One box containing two xerox copies of foreign gift records.

– Three packages containing Gift Unit catalogue cards.

– 8 boxes of Presidential files.

– Assorted boxes and envelopes:

  – 1 Large box domestic gifts—household items for Mrs. Nixon.

– 1 Record size box containing gifts–domestic (mainly household items) for President Nixon and Family.

– 1 Box of copies of Archives Lists–Domestic.

– 1 Box of copies of Archives Lists–Head of State.

– 1 Box of records of Inventory of "Give-Away" Items.

– 1 Box of Department of State Memos–Suggested Gifts for Foreign visits.

– 1 Record size box of an assortment of printed acknowledgement cards used during President Nixon's Administration.

– 1 Record size box containing Gift Unit "Working" Files.

– 6 Record size boxes of miscellaneous drafts, memoranda and form letters, Gift Unit.

– 1 Brown envelope containing manila folder–additional pages plus 1 corrected page to the Archives List.

– 1 Brown envelope containing 48 Alphabetical Cards (Domestic) (Gift Unit).

[Caption Omitted in Printing]

PLAINTIFF NIXON'S SUPPLEMENTAL EVIDENTIARY PRESENTATION

Plaintiff, by his counsel, herewith submits the following materials as a supplement to his evidentiary presentation of June 30, 1975.

1. Pursuant to the joint stipulation of the parties concerning the introduction of affidavits as evidence in

this case, plaintiff submits affidavits from the following persons:

A. Richard A. Jacobs
B. Thomas P. Wolf
C. William F. Matthews
D. Gertrude Fry
E. John C. Broderick
F. Jack A. Albright
G. Mildred Stegall
H. John R. Hubbard

In explanation of plaintiff's filing of these affidavits, plaintiff wishes to inform the Court that the affidavits of Richard A. Jacobs, Thomas P. Wolf, William F. Matthews, Gertrude Fry and John C. Broderick, each of whom is an employee of the federal government, were prepared by plaintiff's counsel following, in most instances, interviews with the affiants attended by counsel for both parties. Draft affidavits were subsequently submitted to government defendants prior to plaintiff's filing deadline of June 30, 1975. These drafts were reviewed and edited by them in consultation with the affiants and counsel for the joint intervenor-defendants.

The affidavits of Jack A. Albright and Mildred Stegall were obtained after their names were provided to plaintiff by the government defendants. Mr. Albright's identification was requested during the first week of July when plaintiff informally asked the government defendants to provide the name of any government employee with knowledge of the nature of the White House taping system during President Johnson's administration. Mr. Albright's name was provided plaintiff's counsel on July 28, 1975. Plaintiff's request for identification of Mildred Stegall was made on July 15, 1975, following plaintiff's receipt of the Director of the Johnson Presidential Library's letter responding to plaintiff's informal dis-

covery request by letter of June 11, 1975. The Director's letter had referred to Mrs. Stegall as ". . . a library employee who had worked for Mr. Johnson for many years . . ." Plaintiff's request for other identification was made on July 15, 1975, and Mrs. Stegall's name was provided to plaintiff on July 22, 1975.

The affidavit of John Hubbard, President of the University of Southern California, was referred to in plaintiff's initial evidentiary presentation filed June 30, 1975. There, plaintiff noted that Mr. Hubbard was traveling in Saudi Arabia and would not return until the latter part of this month.

2. In addition to the affidavits listed in paragraph 1, plaintiff intends to submit within a few days several affidavits from persons serving as Directors of the various Presidential Libraries of the National Archives and Records Service. These affidavits (or a stipulation setting forth the same information) will be based upon the Directors' responses to plaintiff's informal discovery letters of June 11, 1975, which were sent to all Presidential Libraries with the consent of the government defendants. They will also be based upon follow-up questions to the various Directors' affidavits (filed today) by the government defendants in support of their case. Because each of the Directors is an employee of the federal government, plaintiff has had to rely upon the government defendants to obtain responses to the follow-up questions. Those questions were submitted to the government defendants on July 29, one day after the Directors' affidavits upon which the government defendants intended to rely were made available to plaintiff, and the day on which the last response to plaintiff's informal discovery letters was received.

3. Finally, as part of plaintiff's proof in this case, plaintiff intends to rely upon his own testimony and the

testimony of Jeanne Davis given in depositions in this case, and such other evidence as may be received by this Court through stipulations or through submissions of the other parties.

Respectfully submitted,

/s/Herbert J. Miller, Jr.
Herbert J. Miller, Jr.

/s/R. Stan Mortenson
R. Stan Mortenson

MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.—Suite 500
Washington, D.C. 20037
ATTORNEYS FOR PLAINTIFF
Richard M. Nixon

July 31, 1975

[Caption Omitted in Printing]

AFFIDAVIT OF RICHARD A. JACOBS

Richard A. Jacobs, being duly sworn under oath, deposes and says as follows:

1. I am Deputy Assistant Archivist for Presidential Libraries of the National Archives and Records Service, General Services Administration, 8th Street and Pennsylvania Avenue, N.W., and have been employed in that position since July 1972. I was originally employed by the National Archives and Records Service (hereinafter NARS) in September 1958, as a staff archivist in the Exhibits and Publications Branch. Between 1960 and December 1965, I was employed at various positions in

the Administrative Office of NARS. From December 1965 to March 1968, I held the position of Chief of the Central Reference Staff for the National Archives. I was Acting Director of the Herbert Hoover Presidential Library at West Branch, Iowa, between March 1968 and July 1969; and from then until July 1972, I served as Assistant to the Assistant Archivist for Presidential Libraries.

2. From my past and present employment experience with NARS, I have gained first-hand knowledge of the operational methods of each of the Presidential Archival Depositories under the auspices of the National Archival system. I have also gained, both from first-hand study and from discussions with archival colleagues, knowledge of the history of each Library and many of the events relating to the disposition and treatment of the papers and other materials deposited in each Library.

HOOVER LIBRARY

3. Shortly after leaving office, Mr. Hoover directed that the majority of the Presidential historical materials of Mr. Hoover and his immediate staff during his term as President be deposited in the Hoover Institution for War, Revolution and Peace at Stanford University in Palo Alto, California; he retained portions of his Presidential papers at his residence in New York City. By letter dated December 15, 1960, addressed to the Administrator of the General Services, Herbert Hoover indicated his intent to donate, among other things, the Presidential historical materials of Mr. Hoover and his immediate staff during his term of office as President and related materials to the United States to be deposited in a Presidential Library established at West Branch, Iowa. Mr. Hoover annexed to this letter of intent a Statement of Conditions relating to access and the establishment of a Coordinating Committee. A true copy of this letter from Mr. Hoover and its attachment are appended to this Affidavit as Exhibit A. Until 1962, when these files, papers and other related materials were shipped to the Hoover Presidential Library at West Branch, Iowa, the government did not possess these materials.

4. From the close of the Hoover Administration to the deposit of his Presidential historical materials in the Hoover Library at West Branch, Iowa, Mr. Hoover exercised sole control over access to these files and materials. I have seen among the papers deposited at the Hoover Library written approvals and disapprovals of requests by persons for access to Mr. Hoover's files and materials. I recall specifically a denial by Mr. Hoover of a request for access made by Mr. E.E. Robinson, a historian, during the time the materials were on deposit at the Hoover Institution at Stanford. I do not ever recall seeing a request for access by a subsequent Presidential administration.

5. Mr. Hoover, as a condition to the deposit of these materials with the United States, established a Coordinating Committee composed of Allen Hoover, Herbert Hoover, Jr., and such other persons as they might appoint. This committee was granted the authority to exercise, after the death of Mr. Hoover, all of the powers referred to in the Statement of Conditions accompanying Mr. Hoover's letter of intent to donate his Presidential materials. Pursuant to one condition which required the archivists to "seek the advice of and confer with" the Coordinating Committee with respect to the index, cataloguing and exhibition of his files and materials, I, as Acting Director of the Hoover Library, would consult with Allen Hoover from time to time concerning treatment of these materials. I would also recommend to the Coordinating Committee the removal of certain

restrictions upon access to the Presidential materials before actually removing them.

6. The Statement of Conditions further directs the archivists to "seek the advice and confer with" the Coordinating Committee with regard to the staffing of the Library, including the position of director. I am aware that the Coordinating Committee, upon consultation with the archivists regarding the selection of a director, has on occasion expressed disagreement with appointments of certain individuals. Such individuals were not further considered as candidates for such appointments.

7. President Hoover was an active writer throughout his post-Presidential years, authoring some 43 books and numerous articles dealing with various subjects and aspects of his public service.

TRUMAN LIBRARY

8. After President Truman left the Presidency, Presidential historical materials of Mr. Truman and his staff during his term of office were transferred to the Jackson County Courthouse in Kansas City, Missouri, and later to the Memorial Building in Independence, Missouri, where he undertook to organize and review these files.

9. On January 17, 1953, President Truman informed Mr. Jess Larson, the Administrator of General Services, of his preliminary intent to donate to the United States these Presidential historical materials subject to certain restrictions and conditions later to be determined. Pursuant to this letter, the Administrator provided the two requested archivists, subject to Mr. Truman's approval and direction. (Exhibits B, C, D, E)

10. Beginning in early 1957, Presidential historical materials of President Truman and his staff were

transferred to the Truman Library in Independence, Missouri. After the transfer, archivists employed at the Truman Library reviewed these materials to identify and segregate those materials covered by the restriction categories specified in Mr. Truman's letter of intent. These restricted materials were withheld from public access while other portions upon review were gradually opened to the public for research. In addition, Mr. Truman withheld some of his Presidential historical materials in a suite of offices which he maintained at the Library, and these did not come into the possession of the archival staff at the Truman Library until November 1974 under the provisions of Mr. Truman's last will and testament.

EISENHOWER LIBRARY

11. By letter dated April 13, 1960, President Eisenhower offered to donate Presidential historical materials of President Eisenhower and his staff to the United States subject to certain restrictions upon access and other conditions. A true copy of this letter is attached to this Affidavit as Exhibit F. One of the conditions imposed by President Eisenhower was the approval of himself or his representative of all removals of restrictions upon access, and, pursuant to this condition, after the death of the former President, John S. D. Eisenhowerr appointed a committee composed of himself, William Hopkins, Bryce Harlow, and Henry Roemer McPhee. This committee has met several times to review proposals of the Director of the Eisenhower Library for imposing or removing restrictions upon access to Presidential materials and to approve guidelines.

KENNEDY LIBRARY

12. The Presidential historical materials of John F. Kennedy and his staff were donated to the United States

by a deed of gift executed in concert with Jacqueline B. Kennedy, Robert Kennedy, and Edward M. Kennedy as donors and accepted by Lawson B. Knott, Acting Administrator of General Services, dated February 25, 1965. A true copy of this deed is attached to this Affidavit as Exhibit G. The deed of gift stipulates conditions to govern public access to the materials and specifies certain restriction categories under which materials would be withheld from public access. By an amendment to this deed of gift transmitted by letter dated August 20, 1968, the donors provided for the establishment of a donor's committee to guide the archival staff during initial review of documents for imposition of access restrictions. (See Exhibit G)

13. By a letter dated May 5, 1965, the members of the Kennedy family designated as donors notified Lawson B. Knott, Jr., Acting Administrator of General Services, that the Archivist of the United States is authorized to make available to President Lyndon B. Johnson, while in office, any materials that might relate to or be required in connection with the transition of the office of President from the late President Kennedy to President Johnson or that might otherwise be requested by President Johnson for purposes of performance of his official duties. A true copy of this authorization is attached to this Affidavit as Exhibit H.

14. Both the Rockefeller Commission on CIA Activities and the Senate Select Committee Investigating CIA Affairs have requested, through the Office of Presidential Libraries, access to materials of the Truman, Kennedy, and Johnson Administrations. As with all other requests for access to Presidential historical materials located in these archival depositories and in order to comply with the Presidential Libraries Act of 1955, we are processing each request to ensure that the donor restrictions, which Congress mandated we honor, are respected.

JOHNSON LIBRARY

15. President Johnson, by letter of August 13, 1965, to Lawson B. Knott, Jr., Acting Administrator of the General Services Administration, offered his Presidential historical materials to the United States subject to certain restrictions and conditions. An accurate copy of this letter is attached to this Affidavit as Exhibit I. By letter to President Johnson dated August 17, 1965, Mr. Knott accepted the offer. An accurate copy of this letter is attached to this Affidavit as Exhibit J. President Johnson later supplemented his original offer of papers by proposing to the Administrator of General Services that a qualified staff be assembled, making selections from persons within the executive departments and agencies acceptable to President Johnson, to undertake a review of his Presidential historical materials under his direction in order to identify and segregate restricted materials and provide for public access to the remainder as early and as fully as possible. An accurate copy of this letter dated December 19, 1968, is attached to this Affidavit as Exhibit K.

16. When President Johnson left office in 1969, he directed that his Presidential historical materials be transferred to a federal office building in Austin, Texas, to await completion of the Lyndon Baines Johnson Library. Although we have received some documents subsequent to the death of Mr. Johnson from other sources which, according to the donors, were part of the files of President Johnson and his staff, we have no knowledge of any additional Presidential files of Mr. Johnson which were not deposited in the Library.

PRESIDENT NIXON

17. During the early months of the Nixon Administration, two archivists, employed by NARS, were

assigned to the White House to perform developmental work with the files and other materials generated by President Nixon and his staff since I understood that these materials eventually would be housed in a Nixon Library in the same manner as the papers of former Presidents. In January 1971, John H. Nesbitt was employed by NARS and assigned to the White House to assist and supervise this effort begun in 1969. Gradually, the staff under his supervision increased to 9.

GENERAL ARCHIVAL PROCEDURE

18. In each Presidential library, the initial review of materials and segregation of restricted categories is handled by the archival staff, usually in consultation with donor-appointed representatives or a committee, if provided for by the donor in his letter of intent. The categories of such restrictions include national security, the protection of foreign relations, statements or memoranda made to the President in confidence, statements made in the documents which might be used to injure or harass individuals, and statements or documents relating to the private or business affairs of the President or his family, or those who communicate with him.

19. In order to identify documents subject to these donor restrictions, archivists must review the documents to determine content and to determine whether any restriction categories might apply. An archivist could not properly and completely restrict a document because it is related to personal or family business or private affairs without reading at least some of the document.

20. Each President or Presidential agent or heir since Mr. Hoover has not only consented to but has affirmatively requested the help of the NARS staff in reviewing his files and other materials generated by him or his staff and placing specified categories under restrictions as

required by the terms of the agreement. If such a request were not made or such consent not obtained, it would be impractical for the NARS staff to proceed with archival processing of the materials for the early availability to public access as clearly mandated by each letter of intent or deed of gift. If an absolute seal is placed on specified portions of the deposited materials, and accepted by the Administrator, NARS employees are bound to respect that seal.

21. Administering the requirements of section 104(a) of the Presidential Recordings and Materials Preservation Act of 1974 will require a process of screening and review by archival staff similar to but more complex than the process of review conducted in the Presidential and other papers on deposit in the other Presidential libraries. Should the draft regulations which were submitted to Congress on March 19, 1975, become final, the following procedure for processing the materials would be followed. During the early stages of this review process to segregate and protect restrictable materials and to identify and return non-historical personal materials, we contemplate that the panel of senior archivists provided for in the draft regulations will work closely with staff archivists, examining certain documents until working guides and models can be developed for determining which documents should be retained by the United States or returned to Mr. Nixon or other private parties and whether each retained document should be opened to public access or restricted. As the review process continues, this actual review of documents by the panel of senior archivists will not be necessary as the archival staff will have an increasing number of guidelines and models for making such determinations. It is anticipated, however, that the panel of senior archivists will continue to be consulted and called upon to examine certain documents which may not fit within the guidelines or

compare with previous models. Furthermore, the Presidential materials review board, also provided for in the draft regulations, will be available as an additional level of review in difficult cases, will always participate in cases involving the return of non-historical materials by reviewing such categories before public notice is given for a proposed return, and will hear appeals from any interested parties relating to decisions made by archivists with respect to the return of private or personal materials, those having no general historical significance, and any restrictions imposed in accordance with the regulations. Until the regulations become final, and in the absence of such actual review by the panel of senior archivists and the development of guidelines and models, I am unable to state definitively whether any certain documents among the Nixon papers, presented as examples, should be retained by the United States or returned to Mr. Nixon.

22. Attached hereto as Exhibits L, M, and N are true and accurate copies of letters on file in the Office of Presidential Libraries.

/s/Richard A. Jacobs
RICHARD A. JACOBS

Washington)
) ss.
District of Columbia)

Subscribed and sworn to before me
this 29th day of July, 1975.

/s/Francis J. Heppner
Notary Public
My Commission expires: August 31, 1979

EXHIBIT A

HERBERT HOOVER,

The Waldorf Astoria Towers
New York 22, New York
December 15, 1960

Honorable Franklin Floete, Administrator
General Services Administration
General Services Building
Washington 25, D.C.

Dear Mr. Floete:

Through the generosity of friends and the labors of the Herbert Hoover Birthplace Foundation, Inc., a library museum building is now being completed on the Foundation property of some 28 acres at West Branch, Iowa, on which are also situated the cottage in which I was born and various other structures. The holdings of the Foundation, designated collectively as the Herbert Hoover Library Museum, are to be offered as a gift to the United States to house my papers and other historical materials under Section 507(f) of the Federal Property and Administrative Services Act of 1949, as amended, providing for Presidential archival depositories. I am indeed grateful for this action of the Foundation.

In furtherance of it I hereby offer to the United States under Section 507(e) of the Act and subject to the terms hereinafter set forth, all of my collected Presidential papers, wherever they may now be housed, as well as papers accumulated by me prior to my presidency and those accumulated since leaving the White House. These documents will probably number several million papers. My offer also includes other historical materials I have accumulated, such as books, photographs, motion pic-

tures and memorabilia of various kinds. I will transfer these papers and materials as soon as practicable after the transfer to the United States of the Foundation property, at such time or times as may be agreed upon between the Administrator of General Services, or his designee, and me or my representative. Excluded from this offer are the "war and peace" documents gathered since World War I, including records of such public organizations, which I have given to the War and Peace Library at Stanford University, Palo Alto, California, and which are now located there. There may be some other documents or materials which I or my representative shall determine to be excluded from this offer by reason of private or personal interest on my part or on the part of a member of my family.

My offer is conditioned upon acceptance by the United States of the offer of the land and buildings, known collectively as the Herbert Hoover Library Museum, which is being made by the Herbert Hoover Birthplace Foundation, Inc. My offer is further conditioned upon the agreement of the United States to maintain and operate the Library Museum at all times as a Presidential archival depository, as provided by the Act, for the storage of the papers and other historical materials I propose to give.

The papers and historical materials to be transferred to the United States pursuant to this offer are to be kept at the Library Museum, permanently, provided that the Administrator of General Services, subject to general terms and conditions for the handling and preservation of my papers, which conditions are set forth in a "Statement of Conditions" attached to this letter, and designated as "Annex A," shall have the right in his discretion (a) to make temporary loans to such persons, organizations, or institutions as he shall determine, (b) to

dispose by sale, exchange, or otherwise of any such papers or materials which the Archivist of the United States may determine to have no permanent or historical interest or to be surplus to the needs of such Library Museum, and (c) to remove from said Library Museum any or all such papers or materials if he deems it necessary to preserve them from threatened destruction.

I deem it necessary in the public interest, which is, of course, my interest, to prescribe the conditions contained in "Annex A." This is primarily to protect the many confidences of which the President and former presidents of the United States are the recipients. In addition, the period of time covered by my papers is so extended and the subject matters with which they deal so diverse that I consider it essential, particularly during the period of transfer and initial processing, to operate within these conditions. It is, however, my purpose to make available to the public, through your office, a substantial volume of my papers and historical materials at the earliest possible time and ultimately all of them as the passage of time and events may permit. Toward this end, I am establishing a Coordinating Committee, consisting of my sons and executors, to act with your office in my behalf as I shall direct during my lifetime, and to stand in my stead upon my death for such period of time as may be required. The committee will carry out my broad purpose to give the United States my papers and historical materials for access, while at the same time providing for the safeguarding of the information and its use. It is my expectation that the committee, under my direction, will establish procedures for its operation and perpetuation to be of maximum effectiveness in furthering my purposes and of optimum assistance to your office.

I wish to express my appreciation to you and to members of your Administration for your counsel in

connection with this offer of mine. I believe the offer to be in accordance with those made to and accepted by you from others under the legislation providing for Presidential archival depositories. I am hopeful that in swift time we may see this Library Museum in operation as one more source of the materials of which the history of this glorious country is made.

With kindest regards,

Yours faithfully,

/s/Herbert Hoover
Herbert Hoover

ANNEX A

Statement of Conditions

The following conditions shall govern the papers and other historical materials (as defined in the Act of August 12, 1955, 69 Stat. 695, (and hereinafter called Materials) of Herbert Hoover to be transferred to the United States through the Administrator of General Services (hereinafter called Administrator) for deposit in the Presidential archival depository to be established at West Branch, Iowa, under the terms of a letter from former President Hoover to Administrator Floete, dated December 15, 1960, to which this Statement of Conditions is attached as a part.

1. *Persons having access:*

(a) Persons who shall have complete access to the Materials transferred shall be Herbert Hoover (hereinafter sometimes referred to as the Donor), persons designated by him in writing during his lifetime, and, after his death, persons designated in writing by the Coordinating

Committee (hereinafter called the Committee) established by him.

(b) Notwithstanding the foregoing, designated employees of the National Archives and Record Service shall be allowed all access required for the proper performance of normal archival work processes on such materials, not however, to include any publication or any disclosure of such material, under the general supervision of the Archivist of the United States.

2. *Coordinating Committee:*

(a) *Membership:* A Committee is hereby established to serve without compensation and to exercise, after the death of Herbert Hoover, (or during his lifetime as he may designate) all powers referred to in this Statement of Conditions or which Herbert Hoover might have exercised in his lifetime with respect to the Materials. The Committee shall consist of Herbert Hoover, Jr., Allan Hoover, and such others as Herbert Hoover, Jr., and Allan Hoover or the survivor of them may appoint to bring the total number of the Committee to not less than two nor more than five. If vacancies shall occur, Herbert Hoover, Jr., and Allan Hoover or the survivor of them, or after the death of both of them, the then acting member or members of the Committee, shall have power to fill such vacancies by instrument filed with the Committee's Secretary. The Committee shall select its Secretary, and any action taken by the Committee shall be sufficiently evidenced by a certificate in writing made by the Secretary, upon which certificate the Administrator may rely, conclusively.

(b) *Meetings:* Meetings may be held at such place and at such time as the members may from time to time determine, with a majority of the members then acting to constitute a quorum for the transaction of business. The

Committee may act without a meeting by any instrument signed by a majority of the members then acting.

(c) *Delegation of Authority:* The Committee may delegate any of its powers to one or more of its members (save the power to appoint new members as set forth in paragraph 2(a) and the power to remove conditions as set forth in paragraph 7 hereof) and may from time to time authorize one or more members, or any agent, to execute and deliver any instrument on behalf of the Committee.

(d) *Amendment:* Herbert Hoover shall by written instrument have the power to alter or amend this paragraph 2, relating to the establishment and functioning of the Coordinating Committee.

3. *General Advice on Indexing, Cataloging, Exhibition and Staffing:*

The Adminis..ator and the Archivist of the United States shall from time to time seek the advice of and confer generally with Herbert Hoover or with the Committee with respect to standards and procedures to be employed in the indexing, cataloging, and exhibition of the Materials, and with respect to the staffing of the Library Museum.

4. *Deposited and Transferred Materials:*

Materials transmitted to the Library Museum from time to time, by the Donor, or the Committee or others on behalf of the Donor, will be designated as Deposited Materials, title thereto to remain in the Donor, or after the Donor's death in the Committee, pending a determination, to be made during initial processing or as soon thereafter as possible, as to which, if any, of the Deposited Materials are to be excluded because of a personal or private interest of the Donor or a member of his family. Pending transfer of title, Deposited Materials

so excluded may be withdrawn at any time by the Donor or Committee. Upon clearance in writing by the Donor or Committee in the event of Donor's prior death, title to Deposited Materials will vest in and transfer to the United States, and thereafter such Transferred Materials shall be administered by the United States in accordance with this Statement of Conditions.

5. *Sealed Materials:*

(a) The following Classes of Materials shall be segregated upon review and placed under seal:

(1) Those that are security-classified pursuant to law or Executive Order, until such classification shall be removed.

(2) Those the use of which may be prejudicial to the maintenance of good relations with foreign nations.

(3) Those containing statements made by or to Herbert Hoover in confidence.

(4) Those relating to the Hoover family or private business affairs, and those relating to the families or private business affairs of others having had correspondence with Herbert Hoover.

(5) Those containing statements about individuals which might be used to embarrass them or members of their families.

(6) Such other Material as Herbert Hoover, or the Committee, or the Administrator may specify.

(b) Materials which have not been reviewed and Materials placed under seal shall not be made available to anyone or their contents divulged to anyone, except

persons authorized under the terms of paragraph 1, captioned "Persons having access."

(c) Materials placed under seal shall be reexamined from time to time by the Committee or as the Committee may direct and, subject to the approval of Herbert Hoover or the Committee, shall be opened to research use as soon as the passage of time or other circumstances have removed the conditions that required that they be placed under seal.

6. *Access for purpose of research:*

All competent private persons wishing to use for serious, scholarly research Materials which have been reviewed as provided in paragraph 5 above and which have not been placed under seal as a result of such review, shall be granted equal access thereto under rules and regulations to be prescribed by the Administrator or his designee.

7. *Removal of Conditions:*

Any and all conditions included herein as to any, part of, or all of the Materials shall be released as soon as the passage of time or other circumstances, as determined by both the Administrator and the Donor or the Committee, shall have eliminated the present justification therefor.

8. *Rules and Regulations of the Administrator:*

This Statement of Conditions is not intended to prevent the Administrator or his designee from establishing such rules and regulations deemed desirable by him for the use of the Materials, which are not in derogation of any of the conditions set forth herein.

Supreme Court, U. S.
FILED
JAN 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,

JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX
[Volume II – Pages 357-714]

FILED MAY 3, 1976

PROBABLE JURISDICTION NOTED NOVEMBER 29, 1976

Washington, D.C. • THIEL PRESS • (202) 638-4621

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The Opinion of the lower court is printed at 408 F. Supp. 321, and is found in Appendix A to Appellant's Jurisdictional Statement, pp. 1a-106a.

The Order of the lower court is found in Appendix B to Appellant's Jurisdictional Statement, pp. 107a-108a.

The Presidential Recordings and Materials Preservation Act, Pub. Law 93-526, 88 Stat. 1695, 44 U.S.C. §2107 note, 3315-24, is found in Appendix D to Appellant's Jurisdictional Statement, pp. 107a-123a.

9. *Literary Property Rights:*

There are hereby assigned to the United States all of the literary property rights of Herbert Hoover in all his papers which may be transferred to the United States in accordance with the terms and conditions herein expressed, except that there is reserved to Herbert Hoover and his heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that he or they have written or may hereafter write for publication. The foregoing reservation includes the right to lic ase any publisher of such material.

EXHIBIT B

THE WHITE HOUSE
Washington

January 17, 1953

My dear Mr. Larson:

As I am sure you are aware, it is my earnest desire that my personal papers be preserved and ultimately made available for historical research. You are also familiar with the project to raise funds by private subscription for the construction of a library at Grandview, Missouri, to serve as a depository for these and other papers and documentary materials deemed to be of potential interest to scholars. It is the intent of the sponsors of the project to present the library building and grounds to the United States if the Congress by appropriate legislation will accept the property and provide for its maintenance and operation. It would be my wish upon consummation of such an arrangement that title to my papers deposited in the library pass to the United States and the papers themselves become a part of the National Archives.

I therefore propose, as a preliminary step toward such a disposition, to offer my personal papers for deposit in the National Archives pursuant to the provisions of section 507(e) of the Federal Records Act of 1950.

Members of my staff have been discussing with representatives of your Administration certain problems in connection with the custody, storage, and review of the papers pending the completion of the library project and the making of a definitive offer to deposit. I am advised that the plans outlined herein are in accord with the conclusions reached at these conferences.

My personal papers consist mainly, of course, of those accumulated by me during my tenure as President of the United States, but there are some which I acquired while Vice President and Senator, and others which relate to earlier periods in my life.

I propose to retain all of these in my personal possession when I leave office, and to move them to a secure place of storage under guard in Kansas City, Missouri. There I intend to review them and prepare them for ultimate deposit under section 507(e) of the Records Acts. I am requesting you to designate two or three experienced archivists to work with me on this project. I should expect to be consulted regarding the particular individuals to be assigned to the work.

It is my understanding that you have the authority to detail personnel to review or assist in the review of the papers, preliminary to and in connection with a proposed offer for deposit under the provisions of section 507(e) of the Records Act, and that this power is derived from the provision of section 507(a)(3) of the same Act authorizing you "to direct and effect the transfer of materials from private sources authorized to be received by the Administrator by the provisions of subsection (e) of this section."

As has been indicated, this letter is not to be construed as a definitive offer for deposit within the meaning of section 507(e) of the Records Act, but only as a preliminary offer or proposal to deposit. It is my firm intention, however, to offer the great bulk of my personal papers for deposit under the cited section or under whatever similar provision is included in the acceptance legislation in the event that the proposed library at Grandview is constructed and is accepted by the Congress. Alternatively, if the project for construction of the library should be abandoned or fail of accomplishment within a reasonable time, I intend to make an offer for deposit under section 507(e), and to make appropriate provision therefor in my will.

It is not my purpose to pass title to any of my personal papers at this time by virtue of the proposals outlined herein nor to make any binding commitment as to just what papers will be offered for deposit. There will be some few papers which for sentimental reasons I may wish to give to relatives or friends. There will undoubtedly be in the files many papers having no historical value either because they are duplicated elsewhere in official records or because they were of purely transitory interest. Such items can be eliminated in the course of the reviews contemplated, so that the material deposited will not be unnecessarily volumious.

During the interval prior to deposit of the papers, I expect to be working on them and using them to refresh my recollection, consequently I wish to keep them available for my use in connection with my studies and any writing I may do.

Furthermore, I contemplate that when my offer for deposit is made I shall impose restrictions upon the use of certain of the papers for varying periods as may be authorized by law. Such restrictions have customarily

been imposed by my predecessors or their heirs in making deposits of Presidential papers.

I hope that satisfactory arrangements for the preservation and eventual deposit of my papers in the National Archives can be worked out along the lines indicated above.

Sincerely yours,
/s/Harry S. Truman

Honorable Jess Larson,
Administrator
General Services Administration
Washington, D.C.

EXHIBIT D

Harry S. Truman
Federal Reserve Bank Building
Kansas City O, Missouri

February 12, 1957

Honorable Franklin G. Floete
Administrator of General Service
General Services Administration
Washington 25, D.C.

Dear Mr. Floete:

As you know, it has long been my desire to give to the United States the papers accumulated during my years in public office and the other historical materials, mementos, objects of art and other memorabilia acquired by me as President during my term of office, to the end that the people may have those things available for study

and research, and for their enjoyment and education. In pursuit of this objective, a Library building has been constructed in the City of Independence, by public subscription, suitable for housing, preserving and exhibiting these papers and materials. This building is now nearing completion, and it is the intention of the Harry S. Truman Library, Inc., the non-profit corporation which has financed and erected it, to present it as a gift to the United States on certain conditions, and provided the United States will maintain, operate and protect it as a Presidential archival depository as provided in the Federal Property and Adminstrative Services Act of 1949 as amended (65 Stat. 695).

At this time, therefore, under the terms of the said statute, I offer my papers and other historical materials as hereinafter described to the United States on condition that they will be preserved and made available pursuant to restrictions imposed by me, and on condition that they be accepted by the United States on the terms and provisions hereinafter set forth.

1. I offer to the United States all my right, title and interest in my papers now stored in the Memorial Building on Maple Avenue and Pleasant Street in the City of Independence, Missouri. These include substantially all the papers which were in the files of the White House when I relinquished the office of President. They also include a number of other files accumulated by me in my public offices prior to that time, and are estimated to total several million documents.

2. I offer to the United States all my right, title and interest in my other papers relating to my public offices wherever located or stored, with the exception of certain papers determined by me, or in the event of my death by my executors or personal representatives, prior to the transfer therof, to be related in whole or in part to the

business or personal affairs of myself or my family (which term as used in this offer shall include my wife, mother, daughter, brother, sister, nephews or nieces).

3. I offer to the United States all the other historical materials collected during my tenure of public office now belonging to me which are located in Jackson County, Missouri, or elsewhere, other than in my private residence in the City of Independence, Missouri, and which shall not prior to the transfer thereof be marked, labelled or otherwise designated to show a reservation of title in me, or which shall not have been received for the business or personal use of myself or my family. The term "historical materials" as used in this offer shall bear the same meaning as defined in the Federal Property and Administrative Services Act of 1949 as amended (69 Stat. 695).

4. The offers contained in paragraphs 1, 2 and 3 hereof shall lapse and become ineffective unless within one year from the date hereof the United States shall accept the offer of the Harry S. Truman Library and the land surrounding said building now under construction in the City of Independence, Missouri, and shall agree to maintain and operate it at all times thereafter as a Presidential archival depository for the storage of the papers and the other historical materials included in such offers in accordance with the provisions of the Federal Property and Administrative Services Act of 1949 as amended.

5. Upon the acceptance and agreement mentioned in the preceding paragraph, the papers described in paragraph 1 will be transferred to the United States for storage in said building as soon as possible; and the papers and historical materials described in paragraphs 2 and 3 hereof shall be transferred from time to time as shall be agreed upon by the Administrator of the General Services Administration and me or my executors or representatives.

6. I or my executors or personal representatives shall be the sole judge of (a) which papers relate to my various public offices and which relate to the personal or business affairs of myself or my family, and (b) which of my other historical materials were received for the business or personal use of myself or my family.

7. All papers and other historical materials which shall be transferred pursuant to the foregoing to the United States shall be kept permanently in the said Harry S. Truman Library, after the United States shall have accepted and agreed to maintain it as set forth in paragraph 3, subject to the right of the Archivist of the United States in his discretion (a) to make temporary loans thereof to such persons, organizations or institutions as he shall determine, (b) to dispose by sale, exchange or otherwise of any such papers or historical materials which he may determine to have no permanent value or historical interest or to be surplus to the needs of the Harry S. Truman Library, and (c) to remove from the said Library any and all of such papers or historical materials if he shall deem it necessary to preserve them from threatened destruction.

8. All papers transferred by me or my representatives to the United States shall be freely accessible at all reasonable times to me or to persons designated by me in writing during my life or after my death to the persons designated by me in my will.

9. It is my purpose to make the papers and other historical materials referred to herein available for the purpose of study and research as soon as possible and to the fullest possible extent. However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold

from public scrutiny certain papers and classes of papers for varying periods of time.

Therefore, for the time being, the following classes of papers shall be withheld from inspection by, and their contents shall be kept confidential and shall not be divulged to, anyone (including public officials) other than (1) regular employees of the National Archives and Record Service performing normal archival services on such papers under the general supervision of the Archivist of the United States, and (2) myself and persons authorized by me in my will or otherwise to have access to such papers on my behalf, pursuant to paragraph 8 hereof:

(a) Papers that are classified as to secrecy and security pursuant to law until such classification shall be removed. Such classification shall be reviewed from time to time; and

(b) Papers containing statements which may in any manner injure, embarrass or harass any living person or the living members of the family of any deceased person, or papers which may in any manner be prejudicial to the conduct of foreign relations with any government, or papers containing statements made by or to me in confidence in any official capacity.

10. Subject to my approval or the approval of the persons designated by me in my will or otherwise to act after my death with respect to these papers and historical materials, the employees of the National Archives and Record Service may perform the services necessary to the classification of the papers in accordance with the foregoing paragraph, and may place any withheld papers in special files where they shall be available only to me or to such persons or employees.

11. All papers withheld in accordance with the foregoing provisions shall be reexamined from time to time by employees of the National Archives and Records Service under the direction of the Archivist of the United States and, subject to approval by me or by persons designated by me in my will or otherwise to act after my death with respect to those papers and historical materials, shall be opened to general use as soon as the passage of this or other circumstances have removed the conditions that justify their being temporarily withheld.

12. All competent private persons interested in using the papers for purposes of serious scholarly research shall be granted equal access to the papers that are not withheld in accordance with the foregoing.

13. I hereby assign to the United States all my literary property rights in all papers which may be transferred to the United States in accordance with the terms and conditions herein expressed, except that I reserve to myself and my heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that I have written or may hereafter write for publication. The foregoing reservation includes the right to license any publisher of such material.

Sincerely yours,

/s/Harry S. Truman
Harry S. Truman

EXHIBIT F

THE WHITE HOUSE
Washington

April 13, 1960

Dear Mr. Floete:

The papers of a President, which from the time of George Washington have been regarded as the personal property of the President, have, inescapably, a direct and important association with the history of our country. Believing that they should be permanently and generally available for study, I desire that my papers should be made so available and believe that this can best be done through a Presidential archival depository, as provided by the Federal Property and Administrative Services Act of 1949, as amended.

The Eisenhower Presidential Library Commission, an agency of the State of Kansas, now has under construction in the City of Abilene a library building, financed by public subscription, where it is proposed to house my Presidential and other papers. This building is appropriately situated on land adjacent to my boyhood home and to a museum, both of which are maintained by the Eisenhower Foundation, a non-profit corporation organized under the laws of Kansas.

When the Library building has been completed, the Commission intends to present it, together with equipment and grounds, as a gift to the United States, on condition that the United States will maintain and operate this Library as a Presidential archival depository under the provisions of the above cited Act.

Therefore, in furtherance of this plan and in accordance with the provisions of that Act, I now offer as a gift to

the United States such of my papers and other documentary materials as are hereinafter described, on condition that these papers and materials will be accepted, preserved, and made available by the United States under the following terms:

1. Upon the close of my term in office, I shall cause to be transferred to the United States for deposit in the Library at Abilene the bulk of my papers in the White House office, estimated to include several million documents.

2. Other documents, still in my possession, including the remainder of my Presidential papers, the papers accumulated by me before my inauguration as President, and other documentary materials, including books, still pictures, motion pictures, and sound recordings, shall be transferred to the United States for deposit in said Library from time to time as shall be agreed upon by the Administrator of General Services or his representative and me or my representative, except those papers and other documentary materials which shall, before or after my leaving the Office of President, be determined by me or my representative to be excluded from this offer by reason of private or personal interest in such papers or materials on my part or on the part of a member of my family.

3. The offer of the papers and other materials described in paragraphs 1 and 2 hereof is conditioned upon acceptance by the United States of the offer of the land and buildings comprising the Eisenhower Library at Abilene, Kansas, and upon its agreement to maintain and operate the Library at all times thereafter as a Presidential archival depository for the storage of such papers and other materials, in accordance with the provisions of the Federal

Property and Administrative Services Act of 1949, as amended, such acceptance and agreement to be effected within 90 days after the end of the period described in the second proviso to section 507(f) (1) of said Act.

4. All papers and other documentary materials which shall be transferred to the United States pursuant to the foregoing shall be kept in the Library permanently, subject to the right of the Administrator of General Services in his discretion (a) to make temporary loans thereof to such persons, organizations, or institutions as he shall determine, (b) to dispose by sale, exchange, or otherwise of any such papers or documentary materials which the Archivist of the United States may determine to have no permanent or historical interest or to be surplus to the needs of said Library, and (c) to remove from said Library any or all such papers or documentary materials if he deems it necessary to preserve them from threatened destruction.

5. All papers and other documentary materials transferred to the United States pursuant to the foregoing shall be accessible at all reasonable times to me, my son, my representative, or to other persons authorized in writing by me or my son to have access to such papers.

6. It is my purpose to make the papers and other documentary materials donated to the United States by the terms of this instrument available for purposes of serious research as soon as possible and to the fullest extent possible. However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidences is essential to the functioning of the office of the Presidency, it will be necessary to

withhold from public scrutiny certain papers and classes of papers for varying periods of time. In pursuance of this objective and in accordance with the provisions of Section 507(f) (3) of the Federal Property and Administrative Services Act of 1949, as amended, conditions are imposed on the use of my papers as provided in paragraphs 7 through 10 immediately following.

7. Subsequent to the execution of this instrument, the Administrator of General Services shall have the papers that are transferred to the United States reviewed and shall place under seal the following classes of materials:

   a. Papers that are security-classified pursuant to law or Executive Order, until such classification shall be removed.

   b. Papers the use of which may be prejudicial to the maintenance of good relations with foreign nations.

   c. Papers containing statements made by or to me in confidence.

   d. Papers relating to my family or private business affairs, and papers relating to the families or private business affairs of persons who have had correspondence with me.

   e. Papers containing statements about individuals which might be used to injure or harass them or members of their families.

   f. Such other individual files as I, or my representative, or the Administrator of General Services may specify.

8. Papers placed under seal shall not be made available to anyone or their contents divulged to anyone

(including public officials) except (a) persons authorized under the terms of paragraph 5 above, and (b) officials and employees of the National Archives and Records Service when performing essential archival work processes on such papers under the supervision of the Administrator of General Services.

9. All papers placed under seal in accordance with the foregoing provisions shall be reexamined from time to time by officials and employees of the National Archives and Records Service under the direction of the Administrator of General Services and, subject to approval by me or my representative, shall be opened to research use as soon as the passage of time or other circumstances have removed the conditions that required that they be put under seal.

10. All competent private persons interested in using my papers for serious scholarly research shall be granted equal access to those that are not withheld from use according to the foregoing, subject to the regulations issued by the Administrator of General Services governing the use of papers and other documentary materials in the Library.

11. Title to my papers and other documentary materials and the literary property rights in my papers, shall pass to the United States as such papers and materials are transferred to the United States under the terms and conditions herein expressed, except that I reserve to myself and to my heirs (a) a right to make any use of any of these papers in writing for publication, and (b) literary property rights in any works that I have written or may hereafter write for publication. These reservations include the right to license any publisher of any such work.

12. My representative for purposes of paragraphs 2, 5, 7, 8 and 9 shall be such person or persons as I may

designate in a letter filed with the Administrator of General Services. In the event that at any time after my death there should be no representative so designated, my representative shall be my son John Eisenhower, or such person or persons as he may designate in the same manner.

The detailed conditions described in this letter have been drawn up in accordance with known precedents and with the cooperation of officials of your office and of the National Archives. Permit me to express my deep appreciation of the help that all these individuals have given me.

With personal regard,

Sincerely,

/s/Dwight D. Eisenhower

The Honorable Franklin Floete
Administrator of General Services
Washington, D.C.

EXHIBIT G

Honorable Bernard L. Boutin
Administrator of General Services
Washington, D.C. 20405

Dear Mr. Boutin:

FIRST: The late John Fitzgerald Kennedy had said many times both publicly and privately that it was his intention to place certain of his papers and other historical materials in a Presidential archival depository in Massachusetts, in the form of a Library bearing his name, and

had encouraged, and participated in, and arranged for the planning of such an institution.

SECOND: Accordingly, in fulfillment of such stated intention and arrangement, it is our desire to give and deliver to the United States of America for the purpose of ultimate deposit in the said Presidential archival depository in Massachusetts, the papers, documents, historical materials, mementos, objects of art, and other memorabilia, including books, motion pictures, still pictures and sound recordings, hereinafter called "Materials," formerly belonging to and relating to the life and work of John Fitzgerald Kennedy, and which he intended should be so deposited.

THIRD: Therefore, we, the undersigned Jacqueline Bouvier Kennedy and the Executors and Trustees of the estate of John Fitzgerald Kennedy, deceased, hereinafter called the "Donors," hereby convey, assign, give, and donate to the United States of America, hereinafter called the "Donee," effective as of November 22, 1963, and subject to the conditions and restrictions hereinafter set forth, all of our right, title, and interest to the Materials above described, hereinafter called "Materials," as our right, title, and interest may appear, including but not limited to those Materials now stored at the White House, the Executive Office Building, The National Archives Building, or at such other place or places where such Materials may be found, subject, however, to the specific understanding and agreement that:

(i) This gift and transfer shall not and is not intended to apply to or embrace such items as John Fitzgerald Kennedy had not intended to be deposited in said Presidential archival depository, or which are determined by the Donors to be of special or private interest to the personal, family and business affairs of John Fitzgerald Kennedy, his wife and children, parents, brothers and sisters.

(ii) The Donors shall have and specifically reserve the right to retain title and possession and to regain possession of any items that the Donors in their sole discretion may determine in accordance with this paragraph the Third are excluded from the purview of this gift, irrespective of the fact that such items may have been theretofore delivered to the Donee.

(iii) For the purposes of effectuating the provisions of subparagraphs (i) and (ii) of this paragraph the Third, the Donors shall have and specifically reserve the right to examine, at any time or from time to time prior to January 1, 1967, either themselves or through authorized representatives, any Materials from time to time in the possession or custody or under the control of the Donee, and wheresoever the same may be situated, for the purpose of determining and designating any such Materials as being excluded from the purview of this gift, provided, however, that examination of security-classified information shall be in accordance with applicable law or Executive Order relating to security-classified defense information.

(iv) The Donee shall, as soon as is reasonably possible, and upon written notice from the Donors of such designation, deliver to the Donors any items so designated by the Donors pursuant to subparagraph (iii) of this paragraph the Third as excluded from the purview of this gift.

(v) Mrs. Jacqueline Bouvier Kennedy shall have and specifically reserves the right to borrow from the Donee without formality such materials to which this transfer applies as she may wish for her personal use, examination, or display either by herself or by anyone she may select or approve, and any Material so borrowed shall be returned to the Donee within a reasonable period of time.

FOURTH: All Materials to which this transfer is applicable shall be maintained by the United States and stored at such place or places as may be designated by the Administrator of General Services until the completion and acceptance by the United States, pursuant to section 507(f) of the Federal Property and Administrative Services Act of 1949, as amended, of the proposed John F. Kennedy Library, at which time the Materials shall be deposited in that Library and administered in accordance with the pertinent provisions of that Act.

FIFTH: It is the Donors' wish that all Materials donated to the Donee hereunder be made available for research use as soon as possible and to the fullest extent possible. The Donors, however, desire to guard against the possibility of the Materials being used to injure, embarrass, or harass any person and otherwise properly to safeguard the interests of the United States. Therefore, all Materials to which this transfer applies are accepted and shall be held by the Donee subject to the following restrictions and conditions:

(i) The Donors shall have and hereby reserve the right to restrict the time and availability of any Materials to which this transfer applies, and irrespective of the time when such Materials may have been, or may be delivered to the Donee, for such time or times as the Donors in their sole discretion may from time to time or at any time specify, and such restrictions shall be adhered to and observed in all respects for as long a period as the Donors shall have specified or until such restrictions are revoked or terminated by the Donors or by persons legally qualified to act on their behalf with respect thereto. Any Materials so designated in writing by the Donors as restricted shall be known and are hereinafter referred to as "Donors' Restricted Material," and shall be placed under seal, it being

understood, of course, that Donor Restricted Materials shall be accessible to the Archivist of the United States or designated members of his staff for the performance of such archival work processes as may be requested by the Donors, but not otherwise.

(ii) The Archivist of the United States or designated members of his staff shall review the Materials to which this transfer is applicable, except Donors Restricted Material, for the purpose of classifying such Materials. Any Materials which fail within the following categories shall be designated by the Archivist and are hereinafter referred to as "Archivist Restricted Material," and shall be placed under seal:

(a) Materials containing statements which may in any manner be used to injure, embarrass, or harass any person, or Materials which may in any manner be prejudicial to the conduct of foreign relations of the United States of America, or materials containing statements made by or to John Fitzgerald Kennedy in confidence.

(b) Defense information that has been security-classified pursuant to law or Executive Order: *Provided that* such information may be declassified or otherwise made available in accordance with the procedures established by law or Executive Order governing availability of security-classified information.

(c) Materials that relate to the personal, family, and business affairs of John Fitzgerald Kennedy and his family, including such affairs of Mrs. Jacqueline Bouvier Kennedy, and the mother, father, sisters, and brothers of John Fitzgerald Kennedy.

(iii) The review and classification of the Materials hereinabove provided for shall be performed by and in

collaboration between the Donors or their designated representatives and the Administrator of General Services or his designatees and shall be completed within the shortest reasonable period of time after the Materials have been deposited in the John Fitzgerald Kennedy Library in Massachusetts.

(iv) Until such time as the review and classification of the Materials, as hereinabove provided for, has been completed, no person shall be permitted access thereto except the donors, persons given written authorization by the donors, and employees of the General Services Administration performing archival work processes on such Materials, provided, however, that access to Materials which are security-classified shall be in accordance with applicable law and Executive Order relating to security-classified defense information.

SIXTH: Except as otherwise provided herein, all Archivist Restricted Materials shall be available only to employees of the General Services Administration performing archival work processes on such Materials and to the Donors or other persons given written authorization by any of the Donors, provided, however, that access to Archivist Restricted Materials which are security-classified shall be in accordance with applicable law or Executive Order relating to security-classified defense information.

SEVENTH: The Archivist of the United States or his designated representative shall review from time to time Archivist Restricted Materials, and shall remove the restriction from such materials and make them available for research use as soon as the passage of time or other circumstances no longer require their being kept under restriction, provided, however, that notwithstanding anything otherwise or to the contrary in this instrument contained, no restrictions shall be removed in respect of

the materials described in Article *Fifth* ii(c) without the prior written consent of the donors.

EIGHTH: The Donors hereby assign to the United States of America all of their library property rights in all Materials, excluding Donors' Restricted Material during the period of restriction, except that the donors reserve to themselves (a) the right to make any use of such Materials and (b) all literary property rights in any manuscript or other writings that John Fitzgerald Kennedy wrote for publication, including the right to license the publication of such material.

NINTH: All competent persons interested in using the materials for purposes of serious research shall be granted equal access to unrestricted materials.

TENTH: As used herein, the word "Donors" shall mean Mrs. Jacqueline B. Kennedy, and the Executors of and the Trustees under the Last Will and Testament of John Fitzgerald Kennedy from time to time qualified and serving.

/s/Jacqueline B. Kennedy
Donor
/s/Jacqueline B. Kennedy
/s/Bob Kennedy
/s/Edward M. Kennedy
Donors

By virtue of section 507(e) of the Federal Property and Administrative Services Act of 1949, as amended (44 U.S.C. 397(e)), the foregoing gift of the papers and other historical materials of the late President John Fitzgerald Kennedy is accepted.

THE UNITED STATES OF AMERICA
Acting by and Through

Acting /s/Lawson B. Knott, Jr.
Administrator of General Services

Date: February 25, 1965

Burke Marshall
Old Orchard Road, Armonk, New York 16501

August 20, 1966

Dr. James B. Rhoads
Archivist of the United States
Eighth Street & Pennsylvania Ave., N.W.
Washington, D.C.

Dear Dr. Rhoads:

In accordance with our telephone conversation this morning, I am enclosing four copies of the Memorandum of Agreement concerning the procedures to be followed in classifying the papers of President Kennedy under Paragraph Fifth of the Deed of Gift of February 25, 1965. They have been signed by the Donors, and are ready for signature by the Administrator on behalf of the United States.

I would appreciate it if you would have three executed copies returned to me so that Mrs. John F. Kennedy, Senator Edward Kennedy and I can each have a fully executed copy for our files.

While I recognize that this Memorandum of Agreement is probably a public document under the appropriate statute, available for inspection upon request, I do not see any reason for a press release or other statement at this time or, for that matter, at any time prior to the opening of some papers for research, or at least the

opening of the Library. The substantive work all remains to be done. I am sure that you will agree.

We are all grateful for your cooperation and assistance in this matter.

Sincerely,

/s/ Burke Marshall

cc: Mrs. John F. Kennedy
Senator Edward M. Kennedy

Memorandum of Agreement

Paragraph Fifth of the deed of February 25, 1965, effecting the gift to the United States for deposit in the John Fitzgerald Kennedy Library of historical materials formerly belonging to John Fitzgerald Kennedy, provides that the Donors have the right to restrict the use and availability of any of the materials covered by the deed "for such time or times as the Donors in their sole discretion may from time to time or at any time specify". The same paragraph also enables the Archivist of the United States to classify certain types of materials as restricted, and to be placed under seal.

The work of classifying what materials should be restricted for what amount of time, and what materials should be made available for research use, is to be done in accordance with the following provisions:

> "The review and classification of the Materials hereinabove provided for shall be performed by and in collaboration between the Donors or their designated representatives and the Administrator of General Services or his delegatees and shall be completed within the shortest reasonable period of time after the Materials have been deposited in the John Fitzgerald Kennedy Library in Massachusetts."

It is agreed by the Donors and the Administrator of General Services that in view of the delay in the construction of the Library, it is desirable to establish procedures now to begin the "review and classification" prescribed by the deed so that suitable materials may be promptly made available for research use when the John Fitzgerald Kennedy Library has been completed.

As an appropriate means of implementing the collaboration between the Donors and the Donee required by the deed it is agreed that the Donors shall act through a Committee consisting of three persons, as follows:

Burke Marshall, Chairman
Justice Byron R. White
Dr. Herman Kahn

Successor representatives to these Committee members may be designated in writing to the Administrator from time to time by Mrs. John F. Kennedy and Senator Edward M. Kennedy, or the survivor of the two of them. In the event of the death or disability of both Mrs. John F. Kennedy and Senator Edward M. Kennedy, any such designation shall be made by the adult children of the late President John Fitzgerald Kennedy, or in the absense of any such children, by the late President's sisters, with the advice of other members of the family. Any Committee member designated hereunder will serve until a successor is designated.

The delegatees of the Administrator of General Services for this purpose shall be the Archivist of the United States, an Assistant Archivist, the Director of the John Fitzgerald Kennedy Library, when a Director shall have been appointed, and such other officials of the National Archives and Records Services Administration as shall be designated by the Administrator for this purpose from time to time in the future.

The procedure for effecting the processing of the papers shall be a continuing process, as follows: The delegatees of the Administrator of General Services will submit to the Donors' Committee for its review and concurrence a list of those segments, units, subdivisions or series of the papers of John Fitzgerald Kennedy, which it is proposed to review and classify during the period ending December 31, 1972. Committee and the Administrator's delegatees will arrive at an agreement on the order of priority which is to be followed in processing each of the units of paper proposed for "review and classification." The Committee and delegatees will also confer and arrive at an agreement as to the type and character of materials that the Committee wishes at this time to specify as "Donors' Restricted Materials" in accordance with the terms of the Instrument of Gift. (Paragraph the Fifth, Section i). The Donors' Committee and Administrator's delegates will also discuss and arrive at an agreement on the nature and character of the materials that will be placed under seal as "Archivist's Restricted Materials" in compliance with the definitions of that class of materials set forth in the Instrument of Gift (Paragraph the Fifth, Section ii).

The Administrator's delegatees will then undertake the review of the agreed-upon segments of President John Fitzgerald Kennedy's papers, in the order of priority agreed to. From time to time as this review proceeds, the Donors' Committee will inspect the results, examining or sampling both the papers that it is proposed to open for research in the segments examined by the delegatees, and the papers that it is proposed to place under seal. This review by the Committee will cover both the Donors' Restricted Material (if any) and, subject to paragraph Sixth of the aforementioned deed of February 25, 1965, the Archivist's Restricted Material. The purpose of this inspection will be to satisfy the Donors' Committee that

the work is being carried out to the satisfaction of the Committee. Results of the work will continue to be inspected by the Committee to whatever extent it wishes, in order to make certain that the work is being done in accordance with the terms of the aforementioned deed of Febryary 25, 1965, and the agreements reached between the Donors' Committee and the Administrator's delegatees.

All materials selected to be placed under seal will be physically removed from the boxes in which they were contained, placed in clearly marked containers of a color different from that used for the "open" material, and deposited in a specially secured portion of the stack areas of the John Fitzgerald Kennedy Library or of any Federal Records Center where the materials may be temporarily located.

When a significant quality of the materials has been reviewed and processed in this manner (but in no case prior to the formal opening of the Library), there will be a public announcement by the General Services Administration of the opening for research of certain designated portions of President John Fitzgerald Kennedy's papers.

After the completion of this process for the segments of materials that had been designated to be reviewed by December 31, 1972, the same procedure will be followed in scheduling "review and classification" of the remaining segments of President John Fitzgerald Kennedy's papers until the screening of the entire collection has been completed.

The Donor's Restricted Materials and the materials described in paragraph Fifth ii(c) of the aforementioned deed of February 25, 1965, under seal will be periodically reviewed by the Administrator's delegatees. If for any reason it should appear that the passage of time has cured the factor that had been the original cause of

placing the papers under seal, it will be proposed to the Donors' Committee for their review and concurrence that these materials be placed in the "open" portion of the files and made available for research.

signed	signed
	/s/Jacqueline Kennedy
Administrator of General Services - date	Donor - date
	/d/July 23, 1
	Edward A. Kennedy
	2 August
	Donors - date

EXHIBIT H

May 5th, 1965.

Honorable Lawson B. Knott, Jr.
Acting Administrator
General Services Administration
Washington, D.C. 20405

Dear Mr. Knott:

Reference is made to the Agreement between the United States of America and Mrs. Jacqueline B. Kennedy and the Executors of the Estate of John F. Kennedy dated February 25, 1965, concerning the transfer of materials formerly belonging to and relating to the life and work of John Fitzgerald Kennedy to the United States of America.

Notwithstanding any of the restrictions imposed on access to the materials in the referenced February 25, 1965 Agreement, except the materials specified in

Article Fifth ii(c) thereof, the Archivist of the United States is authorized to make available to President Lyndon B. Johnson, while in office, any materials or information with respect thereto, relating to or required in connection with the transition of the Office of President from the late President John F. Kennedy to President Johnson, or otherwise requested by President Johnson in connection with performance of the duties of the Office of President.

/s/Jacqueline B. Kennedy
Donor

/s/Jacqueline B. Kennedy

/s/Robert Kennedy

/s/Edward Kennedy
Donors

EXHIBIT I

The White House
Washington

August 13, 1965

Dear Mr. Knott:

It has long been my belief that the papers and other historical materials of a President constitute a vital part of our Nation's historical heritage and that such papers and materials should be permanently preserved and made available for scholarly research and study.

You are aware that it also has long been my intention to donate my papers and other historical materials to the United States for ultimate deposit in a Presidential Archival Depository as provided by Section 507 (f) of the Federal Property and Administrative Services Act of 1949, ad amended (44 U.S.C. 397(f)).

You are also aware that the University of Texas has advised me of its intent, consistent with its educational purposes and objectives, to provide, at its expense, an appropriate site within the principal academic environs of the University of Texas, and to construct thereon a suitable Presidential Archival Depository to be known as the Lyndon Baines Johnson Library and to turn over, dedicate, and make available the space and facilities so to be constructed, furnished, and equipped by it, to the United States for its use in perpetuity pursuant to the aforesaid authority, as a Presidential Archival Depository for the housing, preservation, display, and appropriate use of my Presidential papers and other historical materials.

I have indicated to the University of Texas and publicly announced my approval of its proposal.

Accordingly, and in furtherance of the public purposes which will thus be served, I hereby offer as a gift to the United States for the purpose of ultimate deposit in the said Presidential Library my Presidential and other papers, documents, historical materials, mementos, objects of art, and other memorabilia, including books, motion pictures, still pictures, and sound recordings, all hereinafter called "Materials" belonging to me or in my possession which relate to my life and work, subject to the condition that these Materials be accepted, preserved, and made available by the United States under the following conditions:

1. As an initial step, the Materials shall be accepted by the United States for deposit in the National Archives pursuant to Section 507(e) of the Act, supra, until the completion and acceptance by the United States of the above-described Lyndon Baines Johnson Library at which time the Materials shall be deposited in that Library and administered in accordance with the pertinent provisions of the Act, supra.

2. It is my purpose to make the papers and other historical materials referred to herein available for the purpose of study and research as soon as possible extent. However, since the President of the United States is the recipient of many confidences from others, and since the inviolability of such confidence is essential to the functioning of the constitutional office of the Presidency, it will be necessary to withhold from public scrutiny certain papers and classes of papers for varying periods of time. Therefore:

(a) I hereby reserve the right to restrict the use and availability of any Materials to which this agreement applies, irrespective of the time when such Materials may have been, or may be delivered to the United States, for such time as I, in my sole discretion, may from time to time specity, and such restrictions shall be adhered to and observed in all respects for as long a period of time as may be specified or until such restrictions are revoked or terminated by me or persons authorized to act on my behalf with respect thereto, or as otherwise provided in this agreement.

(b) During my tenure as President of the United States any Materials accepted and deposited

pursuant to paragraph 1, above, shall be made available by display or otherwise for public inspection, research or other use subject to restrictions (1) imposed at time of delivery of possession thereof to the United States; (2) as otherwise provided for in this agreement; and (3) as may be imposed by me or by persons authorized to act for me with regard thereto.

(c) Archival personnel of the United States designated by the Administrator of General Services shall review the Materials to which this agreement applies and any Materials in the following categories shall be placed under seal of restriction:

(i) Materials containing statements which may in any manner be used to injure, embarrass, or harass any person, or Materials which may in any manner be prejudicial to the conduct of foreign relations of the United States of America, or Materials containing statements made by or to me in confidence.

(ii) Defense information that has been security classified pursuant to law or Executive order: *Provided that* such information may be declassified or otherwise made available in accordance with the procedures established by law or Executive order governing availability of security-classified information.

(iii) Papers relating to my family or private affairs, and papers relating to the families or private affairs of persons who have had correspondence with me.

(d) All Material restricted pursuant to this agreement shall be reviewed from time to time by Archival personnel designated by the Administrator of General Services, the restrictions removed therefrom, and the Materials made available for public display and research use as soon as the passage of time or other circumstances no longer require such Materials being kept under restriction: *Provided that* restrictions imposed on Materials by paragraph 2(b), above, shall not be removed during my tenure as President without my personal approval or the approval of persons authorized to act for me with respect thereto.

(e) Materials placed under restriction pursuant to this agreement shall not be made available to anyone or their contents divulged to anyone (including public officials) except (1) persons authorized under the terms of paragraph 5 below and (2) Archival personnel designated by the Administrator of General Services when performing essential archival work processes on such papers under the supervision of the Administrator of General Services: *Provided that* access to security-classified materials shall be made available in accordance with the procedures established by law or Executive orders.

3. All unrestricted materials shall upon (a) deposit in the Lyndon Baines Johnson Library and (b) expiration of my tenure as President, he made available for public display and inspection, and made equally accessible to all competent private persons interested in using the materials for study and scholarly research purposes subject to regula-

tions issued by the Administrator of General Services governing the use of materials in the Library: *Provided that* such materials may be made available for display, inspection and research purposes prior to the expiration of my tenure as President with my personal approval.

4. This offer shall not and is not intended to apply to or embrace such items which I determine to be of special or private interest to the personal and family affairs of myself, my wife and children, and I specifically reserve the right to retain title and possession and to regain possession of any such items that I, in my sole discretion, may determine to be excluded from the purview of this gift, irrespective of the fact that such items may have been theretofore delivered to the United States.

5. All Materials transferred to the United States pursuant to this agreement shall be freely accessible to me or my wife or to persons designated by me in writing, subject to the provisions of applicable law and Executive orders governing availability of security-classified information.

6. Subject to restrictions imposed by or pursuant to this agreement, all Materials transferred to the United States pursuant to this agreement shall be subject to the right of the Administrator in his discretion (a) to make temporary loans thereof to such persons, organizations or institutions as he shall determine; (b) to dispose by sale, exchange or otherwise of any such papers or historical materials which he may determine to have no permanent value or historical interest or to be surplus to the needs of the Lyndon Baines Johnson Library; and (c) to remove from the said Library any and all of such papers or historical materials if he shall

deem it necessary to preserve them from threatened destruction.

7. I hereby assign to the United States all my literary property rights in all papers transferred to the United States in accordance with the terms and conditions of this agreement, except that I reserve to myself and my heirs (a) the right to make any use of such papers and (b) all literary property rights in any works that I have written or may hereafter write for publication, including the right to license the publication of such material.

8. The offer of the Materials to which this agreement is applicable is conditioned upon the United States, acting by and through the Administrator of General Services, entering into an agreement with the University of Texas to utilize as a Presidential Archival Depository the space and facilities to be constructed, furnished, equipped and made available by it for such use without transfer of title, and upon agreement by the United States to maintain and operate the Library at all times thereafter as a Presidential Archival Depository for the preservation of such Materials, in accordance with the provisions of Section 507(f)(1) (44 U.S.C. 397(f)(1)) of the Federal Property and Administrative Services Act of 1949, as amended.

Sincerely,
/s/Lyndon B. Johnson

Honorable Lawson B. Knott, Jr.
Administrator of General Services
Washington, D.C.

[SEAL]

EXHIBIT J

General Services Administration
Washington 20405

Office of the Administrator

August 17, 1965

The President
The White House

Dear Mr. President:

It is an honor and pleasure on behalf of the United States to accept, in accordance with the powers vested in me by the Federal Property and Administrative Services Act of 1949, as amended, your generous offer of certain papers and other historical materials contained in your letter of August 13, 1965, under the conditions and restrictions which you have prescribed therein.

This priceless gift to the nation and scholars of this generation and those that follow will forever enrich our history and culture. I know that the memory of your selfless gesture will live eternally in the hearts of a grateful people.

Respectfully yours,

/s/Lawson B. Knott, Jr.
Lawson B. Knott, Jr.
Administrator

EXHIBIT K

The White House
Washington

December 19, 1968

Dear Mr. Knott:

In my letter to you of August 13, 1965, I offered my Presidential and other papers and historical materials (therein defined as Materials) as a gift to the United States for the purpose of ultimate deposit in the Lyndon Baines Johnson Library. My offer further expressed this objective: to make the Materials available for the purpose of study and research—as soon as possible and to the fullest extent possible.

That offer was accepted by you on August 17, 1965.

The President is the recipient of many confidences of others. The inviolability of these confidences is essential to the proper conduct of the Office of the Presidency. It becomes necessary, therefore, to withhold from public scrutiny certain papers and certain classes of papers for varying periods of time. Accordingly, my offer contained the following provision in paragraph 2(a):

> "I hereby reserve the right to restrict the use and availability of any Materials to which this agreement applies, irrespective of the time when such Materials may have been, or may be delivered to the United States, for such time as I, in my sole discretion, may from time to time specify, and such restrictions shall be adhered to and observed in all respects for as long a period of time as may be specified or until such restrictions are revoked or terminated by me or persons authorized to act on my behalf with respect thereto, or as otherwise provided in this agreement."

The volume of manuscript papers included in the Materials available for deposit under the terms of our agreement now exceeds 22 million pages. A significant future growth in volume is anticipated, perhaps to a total in excess of 30 million different pages.

These Materials must be reviewed to determine which of them must be restricted and the nature of the restriction. This review will require a meticulously careful, thorough and time-consuming analysis. There are certain papers I will be obliged to restrict personally from access to others.

To fulfill my stated objective of making the Materials available for study and research as early and as fully as possible—and to avoid any extensive delay inconsistent with that objective—a staff should be assembled to perform this review promptly under guidelines and instructions I will provide. A sufficient number of qualified personnel should be assigned to review as much of this material as possible during the next five years when I can devote a large part of my time to supervising this review.

I am advised that within the Executive Departments and Agencies—from which significant portions of these Materials were developed—there are personnel familiar with the Materials and the process of conducting the official business of government. Because of such familiarity, these persons would be far better qualified than persons less acquainted with the Materials to undertake the necessary review and analysis in order to protect our Nation's best interests.

I am advised that Section 208(c) of the Federal Property and Administrative Services Act of 1949, as amended, authorizes the Administrator of General Services, in carrying out the responsibilities imposed upon him by that Act:

"to utilize in his agency the services of officials, officers, and other personnel in other executive agencies, including personnel of the armed services, with the consent of the head of the agency concerned."

It is my understanding that you can complete arrangements with the Heads of the Departments and Agencies concerned to utilize the services of responsible and knowledgeable officials, officers and other government personnel to perform the review and analysis of the Materials, in keeping with paragraph 2(a) of my offer of gift.

Accordingly, when, pursuant to the provisions of law cited above, such government career and service personnel, acceptable to me, are assigned to review under my direction the classified and technical Materials involved, I will turn over to the General Services Administration from time to time the Materials within the scope of my offer of gift.

In addition to the review of the Materials required by paragraph 2(a) of my offer of gift, another review is required by paragraph 2(c). That review contemplates an analysis of the Material by archival personnel. Any of the Materials falling in the three categories specified in paragraph 2(c) must be placed under seal of restriction.

The arrangements I have proposed in this letter for the purposes of the paragraph 2(a) review should enhance, complement, and expedite the review required by paragraph 2(c). These new arrangements should hasten the time in which the Materials can be made available for research and study in conformity with my fundamental objective, as stated in my offer of gift.

I should appreciate your advice whether you accept this letter as an amendment of my offer of gift dated August 13, 1965, accepted by you on August 17, 1965.

Sincerely,
/s/Lyndon B. Johnson

Honorable Lawson B. Knott, Jr.
Administrator
General Services Administration
Washington, D.C.

[Caption Omitted in Printing]

AFFIDAVIT OF THOMAS P. WOLF

Thomas P. Wolf, being duly sworn under oath, hereby deposes and says:

1. Since December 26, 1973, I have served as a Special Assistant to the Administrator of the General Services Administration. I am currently Special Assistant to the Administrator for Presidential Materials and Acting Director, Office of Presidential Materials. In that capacity it has been one of my responsibilities to provide access to the Nixon Presidential Materials that are under the Administrator's control when such access, in each instance, complies with the provisions set forth in outstanding court orders in *Nixon v. Sampson, et al.*

2. In February of this year I was informed by Counsel to President Ford that representatives of the Special Prosecutor's office and attorneys for Richard Nixon had reached an understanding whereby Mr. Nixon agreed to make available to the Special Prosecutor items from among the Nixon Presidential Materials that were relevent to the Special Prosecutor's investigations. I was authorized by the Administrator to serve directly as agent for Counsel to the President in implementing this understanding. The understanding called for the assist-

ance of professional archivists, under my administrative supervision, to review portions of the Presidential materials and to make initial determinations concerning the relevancy of the items reviewed, based upon a list of current investigations supplied to the archivists by the Special Prosecutor. Copies of items deemed relevant were then to be delivered to Mr. Nixon's attorneys. Thereafter, upon receipt of appropriate authorizations from Mr. Nixon's attorneys, the items or portions so authorized were to be delivered to Mr. Philip W. Buchen, or his agent, who would review them prior to providing them to the Special Prosecutor.

3. The Special Prosecutor had previously been provided an index of file folder titles covering the files of certain staff members and staff offices. These file titles encompassed approximately 618 linear feet of documentary materials (or on an archival estimated basis, more than 1.5 million documents). From these indexes the Special Prosecutor selected 1,403 folders which, based upon their titles, he indicated he believed might contain items related to the list of current investigations supplied to the archivists.

4. A staff of approximately ten archivists, working at different periods, initially reviewed 1,269 of the 1,403 files selected by the Special Prosecutor. Attorneys for Mr. Nixon requested and, with the approval of the Special Prosecutor, were permitted to review initially the remaining 134 files. Some but not all of these 134 files were subsequently reviewed by the archivists. At the outset each file reviewed by the archivists was examined to determine whether it contained items related to any of the investigations listed by the Special Prosecutor, even though the Special Prosecutor's original designation of the reason for examination of that file may have pertained to only one or two investigations. On the last

383 folders this examination was limited to those investigations specifically designated by the Special Prosecutor for that specific folder.

5. Of the 1,269 files reviewed, 357 contained materials which the archivists deemed related to one or more of the investigations on the list provided by the Special Prosecutor. Of these, 270 contained items which the archivists deemed actually related to the investigation(s) specified for that folder by the Special Prosecutor.

6. The archivists involvment in the review of the 1,403 files required a total of over 2,800 staff hours.

7. Based upon the experience gained from this project, it is my opinion that because of the differing filing procedures utilized be certain key staff members of the Nixon Administration, this review of the Nixon Presidential Materials for the purpose of locating for the Special Prosecutor items relevant to specific topics or designated matters could not have been made without in many instances reviewing substantial quantities of items unrelated to those topics or matters for which we had been asked to search, including personal and political items, and in some instances materials classified higher than the security clearance (Top Secret) normally held by professional archivists.

/s/Thomas P. Wolf
THOMAS P. WOLF

Subscribed and sworn to
before me this 7th day
of July, 1975.

/s/William Hanbine
Notary Public
My Commission Expires:
August 14, 1976

[Caption Omitted in Printing]

AFFIDAVIT OF WILLIAM F. MATTHEWS

City of Washington)
District of Columbia) ss.

WILLIAM F. MATTHEWS, being duly sworn upon oath, deposes and says as follows:

1. I am Chief of the White House Central Files Unit in the White House. I have been employed in the Central Files Unit, originally known as the White House File Room, since 1947, and have held my current position since February 15, 1963. My duties include supervision of the more than 40 employees of Central Files who receive, classify, file, maintain and retrieve upon request the documents generated or received by the White House.

2. Material in Central Files consists of incoming correspondence processed by the White House mail rooms; copies of outgoing correspondence, reports memoranda, etc., generated or received by the Office of the President and the various White House staff offices. Most of the incoming correspondence consists of letters to the President from private citizens, but it also includes letters from state and federal officials, including Members of Congress; letters from officials of foreign countries; and letters addresses to officials of the White House other than the President. Drafts of memoranda, speeches, correspondence, etc., which are prepared by officials other than the President are generally filed with Central Files. Drafts of such documents which are hand written by the President generally are not retained in Central Files.

3. Correspondence and records of the Domestic Council and the Council on International Economic Policy are filed in the Central files. I have no personal

knowledge of what other files may be retained by these two Councils. All other bodies in the Executive Office of the President (e.g., National Security Council, Office of Management and Budget, Council of Economic Advisors, Council on Environmental Quality, Office of Telecommunications Policy), however, maintain their own separate filing systems, and, as to them, Central Files receives only their correspondence or transmissions into the President's office and copies of the correspondence or transmissions from the President's office to these bodies. As to the Office of the President and the various staff offices, each maintains certain papers in its own filing area during the course of the administration. In addition, most officials in the White House keep a chronological file of the documents prepared by them.

4. Central Files also keeps a file of documents called the "permanent file". This permanent file includes copies of documents which are precedential in nature and which will, in the opinion of White House staff, be useful to later officials in dealing with various internal White House situations by succeeding administrations.

5. The volume of materials maintained in Central Files has increased four or five-fold during the time I have been employed in the unit, that is, since the Truman Administration. This increase is generally attributable to the increase in size and work produce of the White House in general; the nature and scope of materials contained in the materials in Central Files has remained essentially unchanged. The only significant change in content of the Central Files during the Nixon Administration was the creation, in 1971, of the "Special Files Unit" under the direction of Gertrude Fry. That unit, when created, took possession from Central Files of certain materials relating to the Office of the President and selected staff offices and, since 1971, has reviewed and culled materials from

those offices prior to their transmission to Central Files. Access to materials maintained in Special Files was more restricted than was access to the Central Files. I have no personal knowledge of the contents of the materials maintained by the Special Files Unit, although we do receive a cross-referencing card indicating the existence of and identifying such materials.

6. A general description of the operation of Central Files is included in Exhibit A to this Affidavit which is a ttue copy of an eight-page pamphlet which is entitled "The Role of Central Files in the White House Office," and a revision of this pamphlet in 1971, a true copy of which is attached hereto as Exhibit B.

7. At the close of the administrations of Presidents Truman, Eisenhower, Kennedy, and Johnson, the files in the custody of Central Files, except for the permanent file, were collected, boxed, and disposed of in accordance with the wishes of the outgoing President. I have personal knowledge of the disposition of Central Files at the close of the administrations of Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon.

8. In January of 1953, the files in the custody of Central Files, except for the permanent file, were boxed and shipped, in accordance with Mr. Truman's instructions, to a building in Jackson County, Missouri. Except for the permanent file, not a single file in the custody of Central Files received during the Truman Administration remained in the White House Central Files when President Eisenhower assumed office. However, there were other files in the Records Office and the Administrative Office which dealt with various White House functions which remained. I have no knowledge of any attempt to retain or make copies of documents that might be useful to the incoming administration for reference and carrying on the continuing business of government.

9. At the close of the Eisenhower Administration in 1961, the files in the custody of Central Files, except for the permanent file, were boxed and shipped out of the White House prior to January 20, 1961, leaving, to my knowledge, no files in Central Files whatsoever for use or reference by the incoming administration. Some of the materials were shipped to Gettysburg, Pennsylvania, while others were shipped to Albilene, Kansas. To my knowledge, no documents except for the permanent file and files in other White House offices such as the Records Office or the Administrative Office were retained.

10. After President Kennedy's death in November of 1963, all files in the custody of Central Files, except for the permanent file, were segregated from the materials generated thereafter relating to the Johnson Administration. A memorandum from William Hopkins, Senior Executive Clerk at the time and my immediate superior, was sent to all White House staff members describing what should be done with the files relating to the Kennedy Administration. A true copy of that memorandum is attached hereto as Exhibit C. As materials were received after November 22, 1963, relating to the period prior to that date, they were placed in the Kennedy Administration files and kept strictly separate from the files of the Johnson Administration. Mr. Hopkins gave specific instructions that materials from the Kennedy Administration were not to be provided to anyone in the new administration, and in fact no files from the Central Files, except for the permanent file, were provided. However, no attempt was made to get personal or chronological files from the various White House officials. A few months after November 22, 1963, the Kennedy Administration files from the Central files were boxed and sent to a storage area at National Archives to await shipment to Massachusetts upon completion of arrangements for the Kennedy Library.

11. In January 1969, all files of the Johnson Administration in the custody of Central Files, except for the permanent file, were collected, boxed, and shipped to Austin, Texas, for storage until completion of the Johnson Library. No files of any kind in the custody of Central Files were kept or copied for use by the Nixon Administration.

12. At the time of President Nixon's resignation on August 9, 1974, instructions were sent to the staff regarding the disposition of records in their possession. A true copy of the memorandum signed by Jerry Jones, Staff Secretary, setting forth these instructions is attached to this Affidavit as Exhibit D.

13. Over an approximate four day period, beginningg August 9, 1974, all files which had at that date been in the custody of Central Files, except for the permanent file, were boxed and turned over to the Office of Persidential Papers. Files outstanding on August 9, 1974, which were later received from staff offices, were also sent to the Office of Presidential Papers. Such files are still occasionally found among staff office files and when received by Central Files, are then sent to the Office of Presidential Materials. Requests to provide Nixon Administration files to the incoming administration after August 9, 1974, were not honored because all files had been boxed and turned over to the Office of Presidential Papers, later the Office of Presidential Materials.

14. Any calls from officials of the incoming Ford Administration regarding immediate boxing and removal of materials of the Nixon Administration or requests for access thereto, were referred to the Office of Presidential Papers since this is where they had been sent by Central Files.

/s/William F. Matthews
WILLIAM F. MATTHEWS

Subscribed and sworn to before me this 7th day of July, 1975.

/s/William Hinbine
Notary Public
My Commission expires:
August 14, 1976

[Caption Omitted in Printing]

AFFIDAVIT OF GERTRUDE FRY

City of Washington)
District of Columbia) ss.

GERTRUDE FRY, being duly sworn under oath, deposes and says as follows:

1. I am presently employed in the White House Office as Staff Assistant in the Staff Secretary's Office. I was first employed by the White House on January 21, 1969 as Secretarial Assistant to Egil Krogh in charge of security. I then became Staff Assistant for Security until September, 1972, when I was appointed to the position of Supervisor of the Special Files Unit. I held that position until June 23, 1975.

2. The Special Files Unit was created in September, 1972 and continued until June, 1975. At present, it is being phased out by the Ford Administration. It is my understanding that Special Files was created in order to provide a central storage location for sensitive material. Previous to September, 1972, much of this material had not been sent to Central Files, but had been dispersed throughout the White House and held by the individual members of the President's staff in their own offices. Our instructions from President Nixon's then legal counsel,

John Dean, were that such sensitive files should be centrally located and further, that they should be indexed and filed in the same manner as are the files in Central Files. In the absence of such a centrally located and properly categorized file, there was no way of knowing the location of any of these files. Also, the review and categorization of the presidential materials which occurs after the President has left office could proceed more quickly if these sensitive files, prior to the President's leaving, had been centrally filed and properly categorized.

3. In establishing and maintaining the Special Files, we utilized and followed the Central Files Manual, which directs the manner of filing and categorization of all White House documents. As to most files placed in Special Files, a blue cross-reference card was sent to Central Files so that Central Files would have a record of where these files were located.

4. Special Files initially conducted a review of the files in the "Confidential File Section" located in Central Files. Criteria were given to Special Files to determine which documents should be culled from the Confidential File Section and placed in Special Files. The criteria were:

(1) Investigative reports on individuals.

(2) Applications and recommendations for positions.

(3) Documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals.

(4) Documents concerning personal, family or financial affairs of individuals.

(5) Documents containing information which could be used to harass living persons or relatives of recently deceased persons.

(6) Information prejudicial to the national security.

(7) Information prejudicial to foreign relations.

(8) Communications addressed to the President in confidence, the immediate publication of which would result in discouraging confidential communications to a President in the future.

(9) Documents pertaining to the President's personal, family, business, and financial affairs.

(10) Security-classified information.

(11) Documents specifically restricted by the President.

(12) Politically sensitive information or documents.

In addition to documents meeting the above criteria, Special Files also held documents in the President's handwriting, and all the files from the Staff Secretary's Office. During my tenure in the White House, Presidential handwriting documents had never been held in Central Files to my knowledge. Rather, a special file for such documents had been maintained in the Staff Secretary's Office.

5. After initial establishment of Special Files, the plan was that each individual member of of the President's senior staff would send to Special Files sensitive material to be stored for his exclusive retrieval. In practice, however, Special Files did not receive sensitive material from many top staff members. In addition, Special Files did receive the files of all staff members when they resigned during President Nixon's term. We would then review all of these files, and any boxes containing documents meeting the criteria outlined above were retained under Special Files control. The remaining boxes were sent to Central Files. Special Files

now numbers approximately 400 filing boxes roughly one cubic foot in size, approximately sixteen of which contain Presidential handwriting documents. It is also a fact that some materials stored in Special Files were never processed by the Special Files staff. These files were placed in the Special Files Unit after May 1, 1973 when some senior White House staff members resigned. They were placed in the Special Files Unit in order to provide them the tightest security possible.

6. When Special Files was created, access to documents stored there was restricted to the person with whom the file originated or to persons we in Special Files determined had a genuine need to see the document or file. Where questions arose as to a particular request, we cleared the matter with the Staff Secretary.

7. Now that Special Files is being terminated, files of the Ford Administration in our custody will be placed in the Confidential File Section in Central Files. Access will require approval of Mr. Matthews, but only if one of the two criteria formerly used by Special Files and described above is met.

8. As part of my job in Special Files, I have visited some of the Presidential Libraries in the National Archives System. One of my purposes in doing so was to gain knowledge on organizing and arranging Special Files.

/s/Gertrude Fry
GERTRUDE FRY

Subscribed and sworn to before me this 7th day of July, 1975.

/s/ Thomas J. English
Notary Public
My Commission expires: June 30, 1976

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN C. BRODERICK

John C. Broderick, being duly sworn under oath, deposes and says:

(1) I am Chief of the Manuscript Division of the Library of Congress, and have been employed in that position since January 6, 1975. Previous to my appointment as Chief of the Manuscript Division, I was employed by the Library of Congress in various positions beginning in 1964. As a result of my employment with the Library of Congress, and my experience as a student of the papers of constitutional officeholders, I have acquired knowledge of the history and ultimate disposition of certain of those papers. The substance of this Affidavit is derived from that knowledge and represents an accurate summary of these particular instances, to the best of my knowledge, information, and belief.

(2) The Library of Congress maintains the papers, in whole or in part, of twenty-three presidents. The papers of other presidents are located elsewhere. For example, the papers of Presidents John and John Quincy Adams are in the Massachusetts Historical Society; those of James Buchanan in the Historical Society of Pennsylvania; Millard Fillmore's papers are in the Buffalo and Erie County Historical Society; the papers of Rutherford B. Hayes are in the Hayes Library, Fremont. Ohio; and the Warren G. Harding papers are in the Ohio Historical Society. All of these are non-federal repositories. A copy of a chart prepared by my office illustrating the disposition of all of the papers of presidents is attached to this Affidavit as Exhibit A.

(3) Between 1967 and 1974, Justice William J. Brennan donated to the Library of Congress 55,000 documents covering his term in the Supreme Court from

1956 to 1970. The collection includes Memoranda for Conference, Bench Memos, and case files by case name. The case files include memoranda written to other Justices, personal notes on the case, briefs, memoranda from law clerks, and other material which the Justice has accumulated with regard to cases.

(4) Attached hereto as Exhibit B is a true and correct copy of the "Instrument of Gift" executed by Justice Brennan providing the terms on reservation of literary rights and access to legal files and correspondence.

(5) Justice William O. Douglas has donated to the Library of Congress correspondence and other papers pertaining to his work in the Supreme Court and elsewhere covering 1925 to 1952. The content of Justice Douglas' papers is similar to that of Justice Brennan. Attached hereto as Exhibit C are two of the "Instruments of Gift" executed by Justice Douglas providing for disposition and access to these materials.

(6) Between 1972 and 1974, the Hugo Black family donated to the Library of Congress papers from Justice Black's entire career, 1898-1971, including his Supreme Court papers. These later papers include correspondence, assignment and conference lists, opinions in manuscript, near-print and printed form, memoranda, research materials, printed matter, vouchers, financial materials, and clippings. Also included in the collection are dictaphone recordings, phonodiscs, magnetic tapes, and motion pictures. Justice Black directed his family to destroy his conference notes, which was done.

(7) Attached hereto as Exhibit D is a true and correct copy of the "Instrument of Gift" from the Black family to the Library of Congress containing the terms governing literary rights and access to the materials.

(8) The papers of Justice Harold H. Burton number 120,000, span his career from 1896 to 1964, and include legal files, diaries, speech files, articles files, briefs prepared by law clerks for study, conference sheets, studies on individual cases, drafts of opinions, and comments on opinions from other Justices. The majority of the papers were donated to the Library of Congress in two installments: Justice Burton gave a substantial collection in October, 1959; and his son made a second major installment in January, 1965. Attached hereto as Exhibit E are true and correct copies of the "Instruments of Gift" covering the Burton papers governing any restrictions on access, and literary rights.

(9) Mrs. Charles Evans Hughes in 1952 donated to the Library of Congress a large body of correspondence of Chief Justice Hughes. This donation includes correspondence relating to both Hughes' Supreme Court career and personal life. No case files are included such as are in the donations of other Supreme Court Justice. As provided in Exhibit F attached hereto, which is a true and correct copy of the Instrument of Gift executed by Marjory Stuart Hughes, originally access to the collection was prohibited except upon permission of Chief Justice Hughes' daughter. As of January 1, 1975, no restrictions remain. Literary rights are reserved to Chief Justice Hughes' daughter.

(10) The Library of Congress also holds the papers of several Congressmen, although most congressional collections are privately held. For example, the papers os Sam Rayburn are located in the Sam Rayburn Library at Bonham, Texas and the papers of Estes Kefauver are in the University of Tennessee Library at Knoxville, Tennessee. Among the congressional holdings of the Library of Congress are the papers of Emanuel Celler and the papers of Robert A. Taft. Exhibits G and H, attached

hereto, are true and correct copies of Instruments of Gift to the Library. They provide the terms for access to collections and right to review quotations from the materials.

/s/John C. Broderick
JOHN C. BRODERICK

Subscribed and sworn to before me
this 28th day of July, 1975.

/s/Signature
Notary Public
District of Columbia
My Commission Expires: September 30, 1979

BEST COPY AVAILABLE

APPENDIX I

DEPOSITORIES AND PURCHASES OF PRESIDENTIAL PAPERS

President	Depositories[1]	Purchases[2]
George Washington (1732-99). President 1789-97.	The Library of Congress has some 800 volumes of letters, diaries, official papers, and other manuscripts. The Henry E. Huntington Library (San Marino, Calif.) has 450 letters. The Connecticut State Library has the extensive Trumbull correspondence. Other collections are in the Chicago Historical Society (150 pieces), the U.S. Naval Academy (15 pieces), Maryland Historical Society (62 pieces), Boston Public Library (5 vols.), Harvard College Library (58 pieces), William L. Clements Library (Ann Arbor) with 147 items, Detroit Public Library (part of the diary), Minnesota Historical Society (123 pieces), Princeton University Library, New Jersey State Library (3 items), Long Island Historical Society (123 pieces), Cornell University Library (80 pieces), Morristown National Historical Park (95 pieces), Columbia University Library (57 pieces, including parts of the diary), New York Historical Society (215 pieces), New York Public Library, Pierpont Morgan Library (New York, N.Y.) (114 items), Duke University Libraries (59 pieces), Historical Society of Pennsylvania, Virginia Historical Society (225 pieces), Virginia State Library, and William & Mary College (205 pieces). The Washington home, Mount Vernon, has family papers and diaries of the later years.	The Library of Congress acquired its papers in purchases totaling $45,000 in 1834 and 1849.
John Adams (1735-1826). President 1797-1801.	The Adams papers are largely in the Massachusetts Historical Society, which has the diaries, the autobiography, and various manuscripts. There are 8 boxes of papers dated from 1775 to 1813. The Boston Public Library has some papers and some books with annotations by Adams. The post-presidential papers in the Harvard College Library are chiefly retrospective comments on the Revolution. There are scattered papers in the Columbia University Library, the Duke University Hospital Library, Princeton University Library, the Pierpont Morgan Library, and Historical Society of Pennsylvania.	
Thomas Jefferson (1743-1826). President 1801-09.	The Library of Congress has 236 volumes of the correspondence, and the Massachusetts Historical Society has 77 volumes of papers and some of his record books. The University of Virginia has 2,560 items, Colonial Williamsburg 600 pieces, and William & Mary College 285 pieces. The Virginia Historical Society has 100 items, and there are some assorted papers in the Virginia State Library. Other collections are the Henry E. Huntington Library (800 pieces), the Historical Society of Delaware (4 items), the William L. Clements Library (91 pieces), the Missouri Historical Society (130 items), Princeton University Library, Columbia University Library (21 items), New York Historical Society (130 items), New York Public Library, Pierpont Morgan Library (245 pieces), Duke University Libraries (33 pieces), American Philosophic Society (Philadelphia), Historical Society of Pennsylvania, and the University of Texas (68 items).	Many of the 23,600 items held by the Library of Congress were purchased in 1848 for $20,000 from Thomas Jefferson Randolph, executor of the Jefferson estate. Fully half of the collection purchased at that time was returned, however, as being of too "personal" a nature for government acquisition. This returned cache of papers was ultimately dispersed by the heirs to friends, relatives, and collectors.
James Madison (1751-1836). President 1809-17.	There are 114 boxes and 10 volumes of papers in the Library of Congress. The University of Virginia has 165 items, the New York Historical Society, 134 pieces, and the Henry E. Huntington Library 104 pieces. There are smaller collections at the Virginia State Library, William & Mary College, the Virginia Historical Society, the Historical Society of Pennsylvania, the Pierpont Morgan Library, William L. Clements Library, and Princeton University Library. The New York Public Library has a collection of 390 items.	Of the approximately 10,000 items in the Madison collection held by the Library of Congress, most were acquired through 2 purchases from Mrs. Madison and one from the Chicago Historical Society. The cost of the 3 transactions amount to $65,000.
James Monroe (1758-1831). President 1817-25.	Chief repositories are the Library of Congress with 40 volumes and 5 boxes, New York Public Library with 1,300 items, and the James Monroe Memorial Foundation (Fredericksburg, Va.) with an extensive and varied collection. There are also materials at William & Mary College (111 pieces), the University of Virginia (180 pieces), the New York Historical Society (50 items), the Pierpont Morgan Library (30 items), University of Pennsylvania Library (30 items), the Virginia Historical Society (35 items), and the Virginia State Library.	The Library of Congress holds 4,200 items which were acquired from the Monroe heirs in 1849 for $20,000.

See footnotes at end of table.

DEPOSITORIES AND PURCHASES OF PRESIDENTIAL PAPERS—Continued

President	Depositories [1]	Purchases [2]
John Quincy Adams (1767–1848), President 1825–29.	Most are in the Massachusetts Historical Society (some 15,000 diary pages and 6,300 letters). The Library of Congress has several boxes, and scattered items are in the New York Historical Society, the New York Public Library, and the Pierpont Morgan Library.	
Andrew Jackson (1767–1845), President 1829–37.	The Library of Congress has a collection of over 340 volumes and boxes. The Tennessee State Library has 1,500 items, and the Tennessee Historical Society and the Jackson home, the Hermitage, have additional materials. Other collections are the Chicago Historical Society (350 items), New York Public Library (250 items), Pierpont Morgan Library (72 pieces), Duke University Libraries (50 items), Missouri Historical Society (40 items), Princeton University Library, and New York Historical Society.	Of the 20,000 items held by the Library of Congress, a small number of papers were Donated in 1903 by the F. P. Blair family; 2 purchases of papers were made an 1911 and 1932 for a total expenditure of $18,000. Some of Jackson's papers were lost in 1834 when the Hermitage burned.
Martin Van Buren (1782–1862), President 1837–41.	The Library of Congress has 73 volumes and containers, and the New York State Library has a collection of letters. There are smaller collections in the Columbia County Historical Society (Kinderhook, N.Y.), the Pierpont Morgan Library and the Massachusetts Historical Society.	Van Buren's papers remained in the control of his family until 1904–05 when they were presented to the Library of Congress. The former President is thought to have destroyed many of his papers before his death.
William Henry Harrison (1773–1841), President 1841.	Most are in the Library of Congress and Indiana State Library, but A significant presidential writings are limited to his inaugural address.	number of Harrison's records are thought to have been destroyed when his homestead burned in 1858.
John Tyler (1790–1862), President 1841–45.	There are 8 volumes in the Library of Congress, and a smaller collection in the Duke University Libraries. The University of Virginia Library, William & Mary College, and the Pierpont Morgan Library have collections ranging up to 130 pieces.	While a large part of the Tyler cache was burned in 1965 when Richmond was put to the torch, the Library of Congress purchased its collection from Tyler's son in 1919 for $1,000.
James K. Polk (1795–1849), President 1845–49.	The Library of Congress has 188 volumes and boxes. The diary, running to 25 volumes of up to 200 pages each, is in the Chicago Historical Society. Scattered correspondence and papers are in the William L. Clements Library and the Tennessee Historical Society.	There were 2 purchases of Polk papers by the Library of Congress, 1 from a family heir and 1 from the Chicago Historical Society, both of which totaled $13,500.
Zachery Taylor (1784–1850), President 1848–50.	1 volume and 2 boxes are in the Library of Congress. The Kentucky Historical Society (Frankfort), the University of Kentucky Library and the University of North Carolina Library have assorted papers, mostly pre-Presidential.	
Millard Fillmore (1800–74), President 1850–53.	The Buffalo Historical Society has all but a few that are in the Library of Congress.	
Franklin Pierce (1804–69), President 1853–57.	The largest collection, 1,500 items is in the New Hampshire Historical Society. The Library of Congress has a few additional pieces. But the papers relating to the period of the presidency have, for the most part, disappeared.	Pierce is thought to have destroyed many of his papers; much of his official and personal White House correspondence has disappeared.
James Buchanan (1791–1868), President 1857–61.	The Library of Congress has 11 volumes and boxes, and the Historical Society of Pennsylvania has 25,000 items. There is a considerable collection in the Lancaster County (Pa.) Historical Society. Smaller collections are in Franklin & Marshall College Library, Dickinson College Library, the Rutherford B. Hayes Library (Freemont, Ohio), the Pierpont Morgan Library, the New York Historical Society, and the Princeton University Library.	

See footnotes at end of table.

DEPOSITORIES AND PURCHASES OF PRESIDENTIAL PAPERS—Continued

President	Depositories [1]	Purchases [2]
Abraham Lincoln (1809–65), President 1861–65.	The major collection, over 100 volumes and boxes, is in the Library of Congress. The Illinois Historical Society has over 6,000 items, and the Brown University Library 1,678 pieces. There are 4 boxes of material at the University of Chicago. Other collections are at the Chicago Historical Society (50 items), Indiana University Library (215 items), Boston University Libraries (50 items), Harvard College Library (45 items), New York Historical Society (4 volumes and boxes), New York Public Library (4 boxes), Minnesota Historical Society (11 items), Missouri Historical Society (41 items), the Pierpont Morgan Library (25 items), the Rutherford B. Hayes Library (Fremont, Ohio), and Lincoln Memorial University (Harrogate, Tenn.).	
Andrew Johnson (1808–75), President 1865–69.	The Library of Congress has 275 volumes and boxes. The Rutherford B. Hayes Library has 158 items, and the Duke University Libraries have 42 items.	The Library of Congress acquired its collection of Johnson papers through two purchases from family heirs for $7,500.
Ulysses S. Grant (1822–85), President 1869–77.	The Library of Congress has over 200 volumes and boxes. The Henry E. Huntington Library has 345 items, and the Rutherford B. Hayes Library 225 items. Smaller collections are at the Chicago Historical Society (225 pieces), Illinois State Historical Library (200 pieces), Chicago Public Library (10 pieces), Illinois Historical Society (27 letters), the New York Historical Society (35 items), and the Pierpont Morgan Library (11 pieces).	Though not a prolific letter writer, Grant is reported to have returned certain letters he received as President to the originator of the correspondence.
Rutherford B. Hayes (1822–93), President 1877–81.	Some 300 volumes and 75,000 items are in the Rutherford B. Hayes Library in Fremont, Ohio, Hayes's home. Western Reserve University Library has 8 boxes, and the Library of Congress has 5 boxes.	The first actual Presidential library, the Hayes Memorial Library is maintained by the State of Ohio and the Rutherford B. Hayes-Lucy Webb Hayes Foundation.
James A. Garfield (1831–81), President 1881.	There are 343 volumes and boxes, most pre-Presidential, in the Library of Congress. The Ohio Historical Society has 1 box, and the Rutherford B. Hayes Library has 30 items.	The Library of Congress was made a gift of its Garfield collection in 1930–31 by the former President's children.
Chester A. Arthur (1830–86), President 1881–85.	The Library of Congress has 5 boxes; the New York Historical Society 8 volumes of letters and a box of other papers. The Rutherford B. Hayes Library has 16 items.	
Grover Cleveland (1837–1908).	The major collections are at the Library of Congress with 497 volumes and 109 boxes and the Detroit Public Library with 1,250 items largely relating to the second administration. The Buffalo Historical Society has 75 items, New York Historical Society 30 items, and Pierpont Morgan Library, 14 pieces. Princeton University Library also has a varied collection.	The Cleveland collection of the Library of Congress was presented as a gift by Mrs. Preston, the former President's widow.
Benjamin Harrison (1833–1901), President 1889–93.	The Library of Congress has 290 volumes and 193 boxes. Indiana Library has a box of papers, and the Rutherford B. Hayes Library 42 items.	The Harrison papers were presented to the Library of Congress by members of the former President's family.
William McKinley (1843–1901), President 1897–1901.	There is a collection of 417 volumes and boxes in the Library of Congress, and other sizable collections are at the Western Reserve Historical Society and the Western Reserve University Library (2 volumes of letters). A few papers are at the Rutherford B. Hayes Library.	Approximately 122,000 items were presented to the Library of Congress in 1935 by George B. Cortelyou, the President's personal secretary and executor.
Theodore Roosevelt (1858–1919), President 1901–09.	The Library of Congress has well over 1,000 volumes and boxes. There is another large collection at the Harvard College Library. The Pierpont Morgan Library has the manuscript of his autobiography and some letters. William L. Clements Library has 290 items, the University of Southern California Library 60 items, Bowdoin College Library 15 items, Duke University Libraries 43 pieces, and Yale University Library assorted letters.	The T. R. collection held by the Library of Congress was donated by the former President himself.
William H. Taft (1856–1924), President 1909–13.	There are 1,300 boxes at the Library of Congress. Other collections are at the Yale University Library, Princeton University Library, Western Reserve University Library, and the Ohio Historical Society.	Of the half a million item held by the Library of Congress, none could be consulted prior to 1960 without the consent of the Taft family. The first L. C. deposit of Taft papers was made in 1919 and various additions followed after that time.

See footnotes at end of table.

DEPOSITORIES AND PURCHASES OF PRESIDENTIAL PAPERS—Continued

President	Depositories[1]	Purchases[2]
Woodrow Wilson (1856–1924). President 1913–21.	The Library of Congress has 1,375 boxes. Yale University Library has the Wilson-House correspondence. Harvard College Library has the letters to Walter Hines Page. There are major materials at Princeton University, 1,150 items at Columbia University Library. [illegible] Virginia Library has 248 pieces, the Historical [illegible] Wisconsin 30 items, the Maryland Historical Society [illegible], and the Woodrow Wilson Foundation has some mate[illegible]	The Library of Congress holds the former President's collection of academic materials and certain of his university documents and office items.
Warren G. Harding (1865–1923). President 1921–23.	There are 4 boxes in the Library of Congress, 2 boxes in the Ohio Historical Society and an undisclosed amount in the [illegible]ing Memorial Association, Marion, Ohio.	Certain items in the Harding collection will remain under seal until 2014.
Calvin Coolidge (1872–1933). President 1923–29.	The Library of Congress has 347 boxes, and the Forbes Library, Northampton, Mass., 79 volumes and boxes. Smaller collections are at Amherst College Library, the State Library of Massachusetts, and Tulane University Library.	
Herbert C. Hoover (1874–1964). President 1929–33.	The chief repositories are the Hoover Institution on War, Revolution, and Peace at Stanford University, and the Hoover Library at West Branch, Iowa. There are small collections at the University of Southern California, Yale University Library, Harvard College Library, and Princeton University Library.	
Franklin D. Roosevelt (1882–1945). President 1933–45.	There is a great and expanding collection in the Franklin D. Roosevelt Library at Hyde Park, N.Y. The Library of Congress had 1 volume and 2 boxes, and the Duke University Libraries have 26 items.	
Harry S. Truman (1884–1972). President 1945–53.	The central collection is at the Truman Library, Independence, Mo. There are a few papers in the Library of Congress.	
Dwight D. Eisenhower (1890–1969). President 1953–61.	The papers are housed at the Eisenhower Museum in Abilene, Kans.	
John F. Kennedy (1917–63). President 1961–63.	The papers of Kennedy, as well as others relating to his administration, will be housed in a memorial library at Harvard University.	
Lyndon B. Johnson (1908–73). President 1963–69.	The Johnson papers are at the Lyndon Johnson Library located at the University of Texas, Austin, Tex.	
Richard M. Nixon (1913–). President 1969–74.	The Nixon papers are being gathered in Washington at the National Archives for shipment to a Federal Records Center near San Clemente, Calif., where they will be under the joint supervision of the former President and the General Services Administration.	

[1] Information regarding papers depositories is generally drawn from Arthur Bernon Tourtellot. The Presidents on the presidency. Garden City, N.Y., Doubleday & Co., 1964, pp. 471–485; updating material supplied by the National Archives and Records Service.

[2] Information regarding purchases of Presidential papers is drawn from David Demarest Lloyd. Presidential papers and Presidential libraries. Manuscripts, v. 8, fall, 1955: 9–15.

Source: Harold C. Relyea, analyst, American National Government, Government and General Research Division, Sept. 24, 1974.

COUNTY OF ARLINGTON)
) ss
STATE OF VIRGINIA)

AFFIDAVIT

Personally appears before me Jack Alvin Albright, Major General, U.S. Army, who, being duly sworn deposes and says:

(1) I, Jack Alvin Albright was assigned as the Commanding Officer, White House Communications Agency from April 29, 1965 to June 12, 1969. In making this affidavit the following represents my best recollection of actions taken with respect to my assigned duties at the White House Communications Agency.

(2) At the time I assumed the responsibilities of this position I found that there were in existence facilities whereby the President or designated members of the White House Staff could record telephone conversations by a simple act of pushing a button on the telephone or throwing a separate switch which would activate a recording device thereby recording the conversations. My Agency was responsible for installing and servicing these facilities. Either at the end of each day or when the recording belt or tape was completed, a member of my Agency removed the recording and presented it to the secretary of the office concerned. Recordings were transcribed by secretaries in the White House Staff as directed by the office in which the recorders were installed. Recorders were installed or available on selected telephone lines in the office of the President and the office of his Appointments Secretary. In addition, this same capability was available at Aspen Lodge, Camp David, Maryland, the Main Ranch House at the LBJ Ranch in Texas, and the presidential offices in the Federal Office Building in Austin, Texas. These recorders were not equipped with any warning devices.

(3) The conference table in the Cabinet Room at the White House contained hidden microphones which could be activated at the conference table.

(4) In January 1969 President Johnson personally directed me to remove all recording devices from the Cabinet Room and from all telephones. This was accomplished prior to the departure of President Johnson from office.

/s/Jack Alvin Albright
J.A.A.

County of Arlington)
) ss
State of Virginia)

Subscribed and sworn to before me, a Notary Public for the County of Arlington, State of Virginia, this 17th day of July, 1973

/s/Rose C. Morris
Notary Public
My commission expires 20 April 1976.

[Caption Omitted in Printing]

AFFIDAVIT OF MILDRED STEGALL

State of Texas :
: ss.:
County of Travis :

MILDRED STEGALL, being duly sworn under oath, deposes and says as follows:

1. On June 30, 1975, I retired from the position of Program Officer in the Lyndon Baines Johnson Presiden-

tial Library where I had been employed since mid-1969. Prior to that time I was employed as an assistant to President Johnson during his term in the White House. I joined his Senate staff July 1, 1953, and worked continuously for him for the next nineteen and one-half years.

2. I worked with President Johnson in the preparation of his memoirs which he wrote after leaving office on January 20, 1969.

3. I served as personal custodian of a quantity of tape recordings which were recorded in the White House during President Johnson's term. These were principally recordings of telephone conversations between President Johnson and others made on a selective basis from a device activated manually on his secretary's desk outside the Oval Office. Some were recordings of meetings held in the Cabinet Room.

4. President Johnson made frequent use of these recordings during the preparation of his memoirs. On occasions when preparing portions of his memoirs in which the recordings reflected what he had said or done, he would request me to type a transcript of the recordings covering that period so that he could personally review them.

5. Also, when President Johnson considered the transcripts to be pertinent, he would permit members of his staff to review particular recordings. In most instances he dictated summaries of these recordings for the staff members' use in their work on the memoirs.

6. President Johnson on various occasions informed me he considered that ultimately these recordings would be of benefit to historians but that he was concerned that these recordings never be used to injure, embarrass or otherwise reflect adversely upon any person. He in-

structed me, in this regard, that if the recordings should be in my possession at the time of his death, I should deliver them thereafter to the Director of the Presidential Library and inform him that the recordings were to be deposited under seal and that the seal should not be broken nor the recordings reviewed for a period of fifty years from the date of President Johnson's death.

7. At the time of President Johnson's death, the recordings were in fact in my custody. As President Johnson had requested, I delivered them to Harry Middleton, Director of the Johnson Library, and informed him of the fifty years access restriction President Johnson had requested to be imposed.

/s/Mildred Stegall
MILDRED STEGALL

Subscribed and sworn to
before me this 29th day of
July, 1975.

/s/John M. Barr
Notary Public

[SEAL]
My commission Expires:
June 1, 1977

[Caption Omitted in Printing]

AFFIDAVIT OF JOHN R. HUBBARD

I, JOHN R. HUBBARD, being duly sworn, hereby deposes and say:

1. I am the President of the University of Southern California located in Los Angeles, California and have served in that capacity since August 3, 1970.

2. Beginning in approximately March 1975, I engaged in a series of discussions with former President Richard M. Nixon concerning the disposition of the historical materials pertaining to his public career, including those relating to his tenure as President. During those discussions Mr. Nixon expressed to me his desire that these materials be preserved for history and that they be made available to scholars for research and analysis.

3. During these discussions I expressed to Mr. Nixon the University's willingness to establish a library to house Mr. Nixon's historical materials, and I informed him that the University was prepared to operate an appropriate archival facility upon the receipt and inventory of said materials.

4. Although it is the University's desire to include in the Library historical material pertaining to Mr. Nixon's entire public career, the material relating to his tenure as President, particularly those items now in the possession of the Government which are the subject of this lawsuit must, obviously, form the core of the Library. Considering the extraordinary historical significance of many of the events which occurred during Mr. Nixon's Presidency, the University firmly believes that the records behind these events should be made widely available for research and study. In this regard, my discussions with Mr. Nixon included reference to the White House tape recordings which, in the interim depository agreement with the General Services Administration (GSA), Mr. Nixon had agreed should be destroyed as of September 1984, or at the time of his death, after an initial five-year deposit. Mr. Nixon stated that he intended these recordings to be included among the materials transferred to the University and that he would take steps necessary

to eliminate the destruction provisions of that agreement in order to facilitate that expressed intention.

5. A copy of Mr. Nixon's public statement released in conjunction with the announcement of the plans for a presidential library at the University of Southern California is attached hereto as Exhibit A. A copy of the University's public statement in this regard is attached hereto as Exhibit B. The University is presently negotiating with Mr. Nixon through his attorneys as to the precise terms of the Agreement which will finalize these discussions.

/s/John R. Hubbard
J.R.H.

Date: 30 July 1975

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

On July 30, 1975 before me, the undersigned, a Notary Public in and for said State, personally John R. Hubbard, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.
/s/[Illegible]
[SEAL]

[Caption Omitted in Printing]

PLAINTIFF'S BRIEF IN SUPPORT OF CLAIM FOR PERMANENT INJUNCTIVE AND DECLARATORY RELIEF

* * *

III.

THE PRACTICE OF PRESIDENTS AND OTHER CONSTITUTIONAL OFFICEHOLDERS IN EXERCISING INCIDENTS OF OWNERSHIP IN THE PAPERS AND EFFECTS OF THEIR OFFICES

A. *Presidents.*

Although every constitutional officeholder has treated the materials accumulated by him while in office as his own, the record demonstrating in what forms that ownership has been exercised is understandably best documented in the case thoroughly illustrates the unvarying practice of early Presidents and their families in exercising common law incidents of ownership, but it is informative to discuss a few examples here because they not only lend support to plaintiff's claim to the same rights but help explain the rationale that underlies the cutsom of ownership.

The papers of 23 Presidents are now found in the Library of Congress' presidential collections. Historians and scholars employed by the Manuscript Division of the Library have documented the history of the collections and have described how each President and his family disposed of the papers of his office.[21]

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[21]See Stipulation, dated July 31, 1975, concerning the Library of Congress' historical summaries describing its collection of presidential papers and effects [hereinafter "Stip. of Hist. Summ."].

1. *The practice prior to Hoover.*

George Washington.

At the end of Washington's second term, he instructed his personal secretaries to separate from among his papers those which he wished to leave for John Adams' use. The remainder were packed and sent to Mount Vernon. In the short time Washington lived after leaving office, he was able to review only a small portion of his papers. Upon his death, he bequeathed to his nephew, Bushrod Washington, "all the papers in my possession which relate to my civel [sic] and military administration of the affairs of this country, also, such of my private papers as are worth preserving."

From 1800 to 1833, the papers changed location several times, although the bulk of the collection remained in the hands of Chief Justice Marshall, who intended to write a biography of Washington. However, between 1824 and 1827, Washington's nephew negotiated with Jared Sparks to have him write an official biography of Washington. A contract was finally executed, and Bushrod Washington directed that the papers be sent from Marshall to Sparks.

In 1833, the Secretary of State requested of George C. Washington (nephew of the deceased Bushrod Washington and legatee of the papers) that he deposit the papers in the Department of State. Washington agreed to transfer title, with the exception of those "of a private nature, or which it would be obviously improper to make public." He reserved to Sparks the right of publication of the papers. On June 30, 1834, Congress appropriated $25,000 for the purchase of Washington's papers pursuant to the Secretary of State's agreement, and in 1849, it appropriated another $20,000 to purchase papers withheld earlier by Washington under the exceptions

originally agreed upon. (Stip. of His. Summ., *Index To The George Washington Papers,* Library of Congress (1964).

James Monroe.

When Monroe left the Presidency in 1825, he was in financial trouble, and looked to the use of his presidential papers as a source of revenue. He wrote an autobiography and one paper for Congress, using his papers in order to raise money. On January 27, 1828, a new method of obtaining income from the papers was suggested to Monroe by Nicholas Trist of Monticello. Trist suggested that Monroe pledge the income from future publication of his papers relating to Jefferson, in return for a loan (presumably from Trist, although this is unclear). Monroe replied: "Your suggestion as to the sale of my papers, or pledge of them, merits attention."

Upon his death, Monroe entrusted his papers to his son-in-law, Samuel Gouverneur of New York. The legacy required Gouverneur to divide equally with Monroe's two daughters the income from any publication that Gouverneur might undertake. Gouverneur never did publish the papers himself, but in 1844 he transferred the papers to Henry O'Reilly for publication, dividing the profits pursuant to a complicated settlement with Monroe's estate. On June 30, 1850, Congress appropriated $20,000 for the purchase of Monroe's public papers; his private papers were acquired later. (Stip. of Hist. Summ., *Index To the James Monroe Papers,* Library of Congress, 1963.)

Andrew Jackson.

President Jackson, shortly before his death, placed his collection of papers in the hands of Amos Kendall, a close friend, with the following injunction: "On the subject of my papers—You are to retain them so long as

you think necessary [sic] to use them—Should you die they are to pass forth into Mr. [Francis P.] Blair's hands—I have full & unlimited confidence in you both, that my papers will be safe in your hands & that they never will be permitted to be used but for a proper use." After Jackson's death, Andrew Jackson, Jr., contrary to his father's earlier statement, began to collect all of his father's papers and place them in the custody of Mr. Blair. Thus, Francis Blair controlled access to most of the Jackson papers for several years, granting access to such interested persons (e.g., Jackson biographers) as he might deem fit. Kendall retained a substantial number of Jackson papers until his death. After the deaths of Blair and Kendall, the Jackson papers were separated and dislocated, falling into different private hands for several years.

On February 29, 1884, the Senate resolved to "inquire into the propriety and expediency of purchasing said collection of papers from General Jackson's legal heirs . . ." A legal struggle ensued between the heirs of Francis Blair, who had possession of many of the Jackson papers, and the heirs of Andrew Jackson, to determine ownership in the bulk of the papers. On October 29, 1890, the Supreme Court of the District of Columbia dismissed the Jackson heirs' bill of complaint. In 1930 the Library of Congress received deposit of and title to the Blair family's collection of Jackson papers. Later, in 1911 and 1932, two purchases of Jackson papers were made, amounting to $18,000. The Library of Congress later purchased other smaller collections of Jackson papers from different persons including heirs of the former president. (Stip. of Hist. Summ., *Index To The Andrew Jackson Papers,* Library of Congress 1967.)

John Tyler

Tyler took great care in preserving his papers after his presidency. In 1859, he executed a will bequeathing to his sons and son-in-law "for revision and publication if they shall think proper all such of my papers as relate to my own times . . . or to public affairs." To his wife he left all his private papers. Most of his papers were either stolen or destroyed during the Civil War. The small collection presently in the Library of Congress was gathered by Tyler's son, Lyon, and sold for $1,000 to the Library in 1919. (Stip. of Hist. Summ., *Index To The John Tyler Papers,* Library of Congress, 1961.)

James K. Polk.

Upon leaving office in 1849, Polk transferred Administration papers to his Tennessee home and to various departments of government. Polk died shortly after leaving office, and the papers sent to Tennessee remained in Mrs. Polk's possession with two exceptions, until her death in 1891. The two exceptions were for transfer of the papers to an official biographer and to George Bancroft who also undertook a biography of Polk. Both times the papers were returned to Mrs. Polk. Upon her death, Mrs. Polk left the papers to her niece. In 1902, the Chicago Historical Society purchased Polk's diaries as well as some 300-400 letters from her; in 1903 the Library of Congress purchased the bulk of the collection, approximately 10,000 documents. Shortly thereafter, the Chicago Historical Society sold its holdings to the Library of Congress. Finally, in 1910, the Library acquired the remainder of the collection. (Stip. of Hist. Summ., *Index To The James K. Polk Papers,* Library of Congress 1969.)

Abraham Lincoln

Immediately after Lincoln's assassination, Justice David Davis at the request of Robert Lincoln ordered the President's files packed and shipped from the White House. Two aides to the President then removed the papers within two weeks, and transferred them to the National Bank in Bloomington, Illinois. Between 1865 and 1874 it is unclear whether anyone had access to the papers in Bloomington. In 1874, however, Robert Lincoln ordered the collection transferred to J. G. Nicolay in Washington, D. C. for use by Nicolay in writing the official Lincoln biography. The papers remained in Nicolay's possession until 1901, when he died, and then were transferred to the State Department. Robert Lincoln retook possession of the papers in 1905 and only in 1919 did he transfer possession to the Library of Congress. On January 23, 1923, Lincoln deeded title in the papers to the Library of Congress, upon the condition that access to the papers be totally restricted until twenty-one years after Robert's death. Robert died July 26, 1926. (Stip. of Hist. Summ., *Index To The Abraham Lincoln Papers,* Library of Congress 1960).

Andrew Johnson.

Johnson died in 1875, leaving to his eldest daughter, Martha Johnson Patterson, the materials he had taken from the White House. During her years as sole possessor of the papers, she granted very few of the many requests for access. In 1890, she allowed Laura Carter Holloway to use the papers for a biographical sketch of Johnson in another book and in 1900, Holloway and David DeWitt were allowed to use the papers for a biography of Johnson. Martha Patterson died in 1901, and bequeathed the papers to her son, Andrew Johnson Patterson. In

1904, the Library of Congress purchased the papers from him for $7,500. (Stip. of Hist. Summ., *Index To The Andrew Johnson Papers,* Library of Congress 1963).

William McKinley.

McKinley did not provide for disposition of his papers in his will. Instead, a co-executor of his estate, George Cortelyou, assumed responsibility for them. Cortelyou intended to deposit the papers in the Library of Congress in 1905, but for various reasons deferred deposit until 1935. After deposit, he controlled access to the collection until 1940; his son, George, Jr., controlled access until 1954. (Stip. of Hist. Summ., *Index To The William McKinley Papers,* Library of Congress 1963).

William Howard Taft.

President Taft left the Office of the President on March 4, 1913, and assumed residence in New Haven, Connecticut. Once established, he directed the executive clerk at the White House to send his presidential papers to New Haven. All of his papers were not sent, however. In 1915 the executive clerk discovered a group of Taft papers which had been intermixed with the White House Office Files, and immediately dispatched the newly-discovered collection to New Haven. Again, in late 1924, extensive office files of the Taft Administration were discovered in the White House, separate from the General Office Files of the White House Office, and deposited in the Library of Congress at then Chief Justice Taft's request. Earlier, possession of the collection of Taft papers which had been sent to New Haven had been acquired by the Library of Congress. Until 1952 the Taft papers were only on deposit in the Library of Congress; in February of that year the deposit was converted to a gift by Robert A. Taft, Charles P. Taft, and Helen Taft

Manning. Until 1960, none of the papers could be consulted without the consent of the Taft family. (Stip. of Hist. Summ., *Index To The William Howard Taft Papers,* Library of Congress 1972).

Woodrow Wilson.

Despite a request to President Wilson by the Library of Congress that his papers be transferred to the Library immediately following termination of his Presidency, Wilson took his papers with him. A second request for deposit of the papers in 1922 led to a similar refusal. President Wilson replied to the Library: "I am not willing yet to make any such disposition of my papers. I think it best to leave the matter for my last will and testament."

Shortly after Wilson's death in 1924, the Library renewed its request for deposit of the Wilson papers, this time to Mrs. Wilson. The request assured Mrs. Wilson that whatever her wishes regarding treatment of or access to the papers, the Library would respect them:

> "[T]he Library desires the papers as a deposit from you, to be held subject to your orders, to be withdrawn for biographical purposes at your pleasure. The papers would not be open to inspection except on your order. If you so will they will simply be stored, without arrangement of classification. You may treat the Library as a storage warehouse, thereby insuring safety from fire and theft. Meantime we would endeavor to secure originals of the letters that are now in private hands . . ."

Mrs. Wilson replied that she did not wish to deposit the papers at that time, although her desire was to deposit them eventually with the Library. After a biographer had been appointed, Mrs. Wilson reopened negotiations with the Library in 1929 for deposit of the papers. After several months of negotiations, the Library and Mrs.

Wilson agreed to a memorandum of conditions for deposit, which specified several restrictions on access as well as the right of the donor to withdraw the collection from deposit. As the collection was gradually transferred from the biographer to the Library, the public began to gain access to the Wilson papers. All requests for access, however, were referred to Mrs. Wilson for clearance until her death in 1961. (Stip. of Hist. Summ., *Index To The Woodrow Wilson Papers,* Library of Congress 1973).

In sum, although different Presidents disposed of the materials of their offices in different ways, each President without exception took with him the papers of his office or otherwise provided for their preservation or disposition as he deemed appropriate. Moreover, in nearly every case the President or his heirs exercised some incident of ownership in addition to simply protecting the confidentiality of the material itself. Several Presidents bequeathed their papers and effects to their family. (Washington, Monroe, Tyler, Andrew Johnson). Others or their heirs used or authorized the use of their materials to further literary interests. (Washington, Monroe, Polk, Lincoln, Andrew Johnson, Wilson). Some presidential materials were ultimately donated to private collections or to the government. (John Adams, John Quincy Adams, Jackson, Buchanan, Fillmore, Harrison, McKinley, T. Roosevelt, Taft, Wilson, Hayes, Garfield, Cleveland). Some were sold for substantial sums. (Washington, Jefferson, Madison, Monroe, Jackson, Tyler, Polk, Andrew Johnson). Others were simply destroyed. (Van-Buren, Fillmore, Pierce, Harding). (Broderick Aff).

Intervenor-defendants, relying upon the Affidavit of Julian P. Boyd, editor of the Thomas Jefferson Papers, apparently contend that all Presidents did not consider their public papers to be private property. The affidavit, which deals only with Jefferson's Presidency, however,

shows solely Jefferson's concern for the historical preservation of his papers which is not unmindful of the identical concern for preservation exhibited and shared by Presidents Hoover, Roosevelt, Truman, Eisenhower, Kennedy, Johnson and Nixon. His description of the steps taken by Jefferson to deposit official papers in the appropriate departments or agencies could be comparable, for example, to the steps Mr. Nixon undertook to institutionalize the files of the National Security Council, or the general practice in government agencies to retain all records generated or received by them including all communications with the White House. The rather abrupt conclusion of the affiant in paragraph 5 that Jefferson "considered it to be self evident" that "public records are public property" is—as admitted by affiant—unsupported by any expression by Jefferson.

2. *The practice since President Hoover.*

The collections of papers of early Presidents reveal indirectly that each took with him those items he accumulated while in the White House; there is direct evidence of the fact, however, since the Administration of President Hoover. It is provided by William J. Hopkins, a career White House employee who served every President from Hoover to Nixon. As a general matter, Mr. Hopkins expressed the transition practice as follows:

> "At the end of each Presidential Administration under which I served, all of the files maintained by the Central File Room, as well as those maintained separately by the President's staff and his personal secretary, were packaged and shipped to a designated location selected by the retiring President or his representative. The only files which remained for the incoming Administration were the files of the Administrative Office, the card file in the Records Office, and a small 'precedent file' maintained in Central Files." (Hopkins Aff. 6)

In reference to specific transitions the following occurred.

President Roosevelt.

Portions of President Roosevelt's materials had been sent to his library in Hyde Park during his term in office. Mr. Hopkins describes the handling of those files which remained in the White House Office at Roosevelt's death.

> "Because of the death of President Roosevelt during his term in office, the packing and shipping of his files was less well prepared than during the changeover from President Hoover to President Roosevelt. President Roosevelt had already shipped to Hyde Park for storage some of his files which had become inactive. All of the files that remained in Central Files were packed in large boxes and sent to the National Archives within 72 hours of President Roosevelt's death. Nothing was left in Central Files except the small precedent file. The incoming mail which had not yet been acknowledged at the time of President Roosevelt's death was left unanswered, bosed for transfer to the National Archives, and for subsequent forwarding to Hyde Park. Although President Roosevelt's material was in the Archives building temporarily, access to it was controlled by President Roosevelt's Private Secretary, Grace Tully, and later by a committee consisting of Grace Tully, Judge Samuel Rosenman, and others whom I do not presently recall.

President Roosevelt, like all other Presidents, maintained his own personal file which was not comingled with the files in Central Files. Grace Tully had responsibility for and control over access to this file, which consisted of materials more political or more sensitive than the materials normally sent to Central Files. Upon President Roosevelt's death, this file was sent to the Archives

as well, where Miss Tully, having sole control over access, personally worked with the file for several months before its eventual transfer to the Roosevelt Library in Hyde Park.

The files of President Roosevelt's staff that were not maintained in Central Files were also packed and sent to the National Archives Building with the rest of the Presidential materials at the time of Roosevelt's death. Because of the abrupt change of Administrations, some of the staff members worked in the White House on President Truman's staff for an interim period, and maintained those materials in their files which were active at the time of the changeover. Shortly, however, even those materials were forwarded for inclusion among President Roosevelt's materials." (Hopkins Aff. 9-10).

President Truman.

At the close of the Truman Administration, approximately 1,600 file drawers of Presidential materials were sent to Missouri at President Truman's request. Again, Mr. Hopkins recalls the incident:

"We used old file cases found in the attic of the Old Soldier's Home in Washington, D. C. to package and ship these materials to Kansas City. President Truman's personal file (which included daily summaries sent to President Truman from the National Security Council) were sent to a bank building in Kansas City where they were organized and maintained by President Truman's secretary, Rose Conway. It is my understanding that President Truman maintained control over this category of his files until his death." (Hopkins Aff. 10.)

President Eisenhower.

The first-hand account of President Eisenhower's departure from the White House is provided by his son, John S. D. Eisenhower, who personally supervised the collection and transfer of his father's papers and effects.

"Near the conclusion of my father's second term as President, I began the process of arranging for the disposition of all the materials generated by or retained within the Office of the President during his Administration. Through conversations with President Eisenhower and others, I was aware that prior to the time my father arrived in the White House on January 20, 1953, the prior administration had removed from the White House and Executive Office Building offices all staff and central files pertaining to the work of that administration. My father informed me that the only material left for him was a single page of instructions to be used in the event of national crisis and National Security Policy Documents. All other files had been removed. We were informed that this same general procedure had been followed by every prior administration, and we determined that we would adopt the same policy.

To begin the task of packaging the presidential materials for shipment from the White House, White House Staff Secretary, A. J. Goodpaster, prepared a memorandum to be sent to all members of the White House staff directing them to package at least 75 percent to 90 percent of their individual files and deliver them to a temporary storage area preparatory to transfer to Abilene, Kansas. This memorandum was circulated approximately December 15, 1960, and the request deadline for packaging and transfer was December 23. On January 11, 1961, a second memorandum was sent by Wilton Persons to all staff members reiterating the directive for

packaging of the Eisenhower Presidential files. In this memorandum, the staff was told to '. . . clear out every last possible paper (other than strictly personal) from their files!!!' and to box, label, and place them in the custody of GSA by the end of the day, January 16. Nothing was to be left in any office that was not 'completely essential.'

With regard to the material, if any, that was to be left for the incoming administration, the memorandum directed, that such items should be 'cleared with the President' through the office of staff secretary.

On the afternoon of January 19, 1961, within hours of the inauguration of John F. Kennedy, I personally toured the staff offices and gathered several storage cabinet safes that had not previously been prepared for shipment. Apart from these safes, there was no files nor other items of Presidential materials left for the incoming administration.

With respect to the President's personal files, they had previously been packaged for shipment to President Eisenhower's future office in Gettysburg. The only material left by President Eisenhower for President Kennedy was a sachel containing a series of orders and instructions to be of assistance in the event of nuclear attack or other national crisis." (Eisenhower Aff 4-6.)

President Kennedy.

The unexpected death of President Kennedy and the resulting abrupt transition to President Johnson's Administration posed some of the same problems faced by Mr. Hopkins earlier in the Roosevelt-Truman transition and later by other staff members in the Nixon-Ford transition.

"When President Johnson succeeded to the Presidency there had been no opportunity for

advance planning regarding disposition of President Kennedy's files. Many of President Kennedy's staff continued on for the time being as members of President Johnson's staff. Contrary to the rather immediate action in removing the files at the time of President Roosevelt's death, it was deemed necessary to retain most of President Kennedy's files at the White House for the time being for use by the Staff. In order to insure during this interim period that President Kennedy's files be kept inviolable with no comingling, at the direction of McGeorge Bundy, (a member of President Kennedy's staff who remained on with President Johnson for a time) I prepared a memorandum providing instructions to the staff on the handling of the files during the period when the files of both Presidents were active within the White House Office . . . This dual operation worked itself out in a matter of months and eventually all of President Kennedy's files were removed from the White House Office in accordance with the pattern of his predecessors." (Hopkins Aff. 12.)

Unlike all prior Presidents, however, President Kennedy had generated while in office, in addition to the usual papers and effects, dictabelt recordings of telephone conversations and tape recordings of meetings between himself and others. These were removed from the White House after his death. To date only one has been donated to the United States.[22]

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[22]The assistant director of the Kennedy Library states:

> There are 68 dictabelts of telephone conversation and 125 magnetic tapes of meetings between President Kennedy and others which are or have been physically stored in the Kennedy Library but have not yet been turned over to the library. Consequently, the library staff has only very limited knowledge of their nature and extent. Among the material which has been

[footnote continued]

President Johnson

President Johnson, perhaps more than any of his predecessors, other than Roosevelt, began early to plan for the creation of his library.

> "President Johnson was very much concerned with the preservation of his Presidential materials. I can recall instances in which he discussed with me and others concerning this matter. I recall one conversation in which President Johnson stated in effect that when a staff member comes aboard he comes with his hat in his hand and he should leave the same way. As a result of President Johnson's concern, frequent efforts were made to contact all staff members to advise them as to the separation of Presidential from their own personal materials; a memorandum providing guidelines for this separation was attempted but never distributed." (Hopkins Aff. 12-12.)

When Johnson's term ended, as in each prior transition, the same White House Office files were packaged and transferred to the President's designated location (this time the Federal Building in Austin, Texas). However, in order to provide a more complete history of his Administration at his presidential library, Johnson went beyond the practices of most prior Presidents in at least two respects. First, like Kennedy, during his term in office Johnson had a tape recording system installed with which he and certain members of his staff could

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donated to the library as a part of President Kennedy's papers is one tape of two telephone conversations between President Kennedy and Prime Minister Macmillan (October 1962). This tape (and transcript) is classified as top secret.

See Stipulation, dated Aug. 19, 1975, concerning the testimony of the Directors of the Presidential Libraries [hereinafter Stip. of Dir. Test."] Exhibit G, at 5-6.

selectively record telephone conversations in various offices at the White House, Camp David and Austin, Texas. In addition, a recording system of hidden microphones had been installed in the Cabinet Room. (Albright Aff. 1-2.) Approximately eight cubic feet of recorded reels of those conversations were transferred to Texas as part of the Johnson presidential materials.[23] (Stip. of Dir. Test., Exhibit F, at 1.) Second, during the last few months of Johnson's term, members of his staff collected large quantities of microfilm of records from the various federal agencies pertaining to the "Great Society" and other programs with which President Johnson was most closely affiliated. These microfilms were also transferred to Texas for inclusion in the Johnson Library. (Nesbitt Dep. 66-67.)

President Nixon

In keeping with the developing tradition of his immediate predecessors, President Nixon's staff after assuming office, began plans for the establishment of a presidential library which would house Nixon's presidential papers at the conclusion of his term. A private foundation was created to select the site and to raise the funds for the structure that would be donated to the government under the Presidential Libraries Act. (Nesbitt Dep. 58-60.)

The plans for a presidential library were far from complete when on August 9 President Nixon resigned

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[23]The tape recordings of President Johnson's conversations which have been placed in the Johnson Library under a fifty year access restriction were utilized extensively by Mr. Johnson in preparing his memoirs. An account of this usage, and the steps President Johnson took to safeguard the confidentiality of these records is contained in the Stegall Affidavit, Ex. G, Pl's. Supp. Evid.

from office. In leaving, he instructed his staff to arrange for the collection and transfer of his presidential materials to California. This task fell primarily upon three people: Jerry Jones, the White House Staff Secretary; Leonard Garment, Counsel to President Nixon; and John Nesbitt, who had headed the Office of Presidential Papers in the White House during most of President Nixon's term and who had coordinated the planning for the presidential library. (Nesbitt Dep. 38-39; Pl's Aff. 2).

Shortly after the resignation these three individuals met to discuss the arrangements for disposition of the Nixon materials. They agreed, that the transition should be carried out in such fashion that the needs of the incumbent Administration for access to Nixon presidential materials could be accommodated. Mr. Nesbitt, recognizing the similarity of circumstances to the abrupt Kennedy-Johnson transition, obtained a copy of the Hopkins memorandum circulated after Kennedy's death instructing staff members to segregate immediately their Kennedy materials. (Matthews Aff. Exhibit C) This memorandum formed the basis for the Jones memorandum sent to all members of the White House Office. (Matthews Aff. Exhibit D) However, one significant change was made. In the Jones memorandum, each staff member was instructed to make copies of any of the Nixon materials he might need for ongoing government business. The copies were to become part of the Ford presidential materials. The remainder of the materials were to be packed for shipment to President Nixon. (Nesbitt Dep. 50-44.) In all other respects the packing and preparation of the Nixon presidential materials proceeded as it had in the close of 36 prior Administrations, until it was called to a halt by the incumbent Administration at the request of the Special Prosecutor.

B. *Supreme Court Justices.*

As we have noted, the matter of constitutional officeholders' ownership of the materials of their respective offices is by no means limited to Presidents. The following are merely illustrative of the fact.

The Library of Congress presently contains several collections of papers donated or deposited by Justices of the Supreme Court, including Justices Brennan and Douglas and former Justices Black, Hughes and Frankfurter. In placing their materials in the Library of Congress, members of the Court and their families, like former Presidents and their families, have taken steps to preserve the confidentiality of their materials and have exercised ownership rights recognized under common law.[24]

William J. Brennan.

Between 1967 and 1974, Justice Brennan donated to the Library of Congress 55,000 documents covering his work on the Court from 1956 to 1970. The collection includes Memoranda for Conference, Bench Memos, case files containing memoranda written to other Justices, personal notes on the case, briefs, and memoranda from law clerks. In making this donation, Justice Brennan has expressly reserved for his lifetime the literary rights to his unpublished donated writings. He has also prohibited access to his legal files and correspondence files except with his personal permission. The Justice's "Personal Annual Reviews of the Terms' Work" is closed to access until the death of all Justices participating in the decisions reviewed.

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[24]The following summaries are based upon the Affidavit of John C. Broderick and attachments.

William O. Douglas.

Justice Douglas has donated personal correspondence and Supreme Court papers covering 1939 to 1952. The content in Justice Douglas' papers is similar to that of Justice Brennan. Justice Douglas has forbidden access to his donated files during his life.

Hugo L. Black.

Between 1972 and 1974, the Hugo Black family donated to the Library of Congress papers from Justice Black's entire career, 1898-1971, including his Supreme Court papers. The latter papers include correspondence, assignment and conference lists, opinions in manuscript, nearprint and printed form, memoranda, research materials, printed matter, vouchers, financial materials, and clippings. Also included in the collection are dictaphone recording, phonodiscs, magnetic tapes, and motion pictures. Justice Black directed that his conference notes be destroyed after his death, which was done.

The terms of the donation provide that the literary rights will be dedicated ultimately to the public, but are reserved to members of the Black family during the lifetime of each member. Access to the files requires permission of Mrs. Black and Hugo L. Black, Jr. If access is granted, the researcher cannot publish or write for publication without permission of the same two persons. Access to the Supreme Court files is closed until the death or retirement of all Justices who were active during the time of the decision being accessed.

Charles Evans Hughes.

Mrs. Hughes in 1952 donated to the Library of Congress a large body of correspondence of Chief Justice Hughes. This donation includes correspondence relating

to both Chief Justice Hughes' public career and personal life. No case files are included such as are in the donations of other Supreme Court Justices. Originally access to the collection was prohibited except upon permission of Chief Justice Hughes' daughter. As of January 1, 1975, no restrictions remain. However, literary rights are reserved to Chief Justice Hughes' daughter.

Felix Frankfurter.

Justice Frankfurter placed the bulk of his papers in three different depositories: his Supreme Court papers and his correspondence relating to the Sacco-Vanzetti case were given to Harvard Law School; his papers relating to the Zionist movement are at the Hebrew University in Israel; the ramainder of his papers, covering the period from 1906 to 1965, were placed in the Library of Congress in several installments beginning in May, 1967. A sizeable portion of the Library of Congress collection was stolen in 1973. (Washington Post, August 10, 1975. Sec B, p.1). Literary rights in the unpublished writings of Justice Frankfurter have been dedicated to the public, except that these rights are reserved for a period of 16 years from the date of each paper. (Register of the Papers of Felix Frankfurter in the Library of Congress (Library of Congress 1971), at 4-7).

C. *Congressmen.*

Because of the sheer number of Members of Congress it is impossible to discern a pattern for the disposition of their materials. However, it can be said that uniformly each member takes with him the papers and effects of his office as he desires and disposes of them as he sees fit. The Library of Congress holds the papers of several Congressmen, although most such collections are pri-

vately held. For example, the papers of Sam Rayburn are located in the Sam Rayburn Library at Bonham, Texas; the papers of Estes Kefauver are in the University of Tennessee Library at Knoxville, Tennessee; those of Everett M. Dirksen are stored principally at the University of Illinois. Among the Library of Congress holdings are the papers of Emanuel Celler and the papers of Robert A. Taft. Access to collections is controlled respectively by Mr. Celler and Mr. Taft. In addition, Mr. Taft reserves the right to review quotations for matters of taste. (Broderick Aff. 1-2.)

[Caption Omitted in Printing]

STIPULATION

On June 11, 1975, Plaintiff, by counsel, sent letters to the Directors of each of the existing Presidential Libraries posing various questions concerning the nature of certain of the materials deposited in each Presidential Library and the operation of each Library as it related to issues pending in this litigation. Responses by the Directors to these questions were received from the Government in late July.

With regard to these responses, it is hereby stipulated by and between the parties that the following persons, if called upon to testify in this litigation, would testify upon direct examination, and subject to all appropriate objections, according to the responses in the letters attached as exhibits to this stipulation:

1. Thomas T. Thalken—Exhibit A
2. William R. Emerson—Exhibit B
3. Benedict K. Zobrist—Exhibit C
4. John E. Wickman—Exhibit D

5. Dan H. Fenn, Jr.—Exhibit—E
6. Harry J. Middleton—Exhibit F

On July 29, 1975, Plaintiff submitted to the government defendants additional questions to be posed to the Directors of the Libraries. On August 12, 1975, the government defendants, after receiving answers to the questions posed, incorporated those answers in a letter signed by government counsel, attached to this Stipulation as Exhibit G.

With regard to Exhibit G, it is hereby stipulated by and between the parties that if called to testify in this litigation, upon cross-examination the Directors would have testified subject to appropriate objection, according to the answers given in Exhibit G.

/s/Irwin Goldbloom
IRWIN GOLDBLOOM
DAVID J. ANDERSON
Department of Justice
Tenth & Pennsylvania Ave., N.W.
Washington, D.C. 20530

ATTORNEYS FOR DEFENDANTS
Administrator of General
Services and United States
of America

/s/Henry S. Ruth
HENRY S. RUTH

/s/Richard J. Davis
RICHARD J. DAVIS
Office of Watergate Special
Prosecution Force

/s/Mark J. Spooner
ROBERT HERZSTEIN
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1229–19th Street, N.W.
Washington, D.C. 20036

ATTORNEYS FOR INTERVENOR–
DEFENDANTS
Reports Committee for Freedom
of the Press, et al.

/s/Herbert J. Miller, Jr.
HERBERT J. MILLER, JR.
R. STAN MORTENSON
2555 M Street, N.W.
Washington, D.C. 20037

ATTORNEYS FOR PLAINTIFF
Richard M. Nixon

/s/Andra N. Oakes
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D.C. 20036

ATTORNEY FOR INTERVENOR–
DEFENDANTS
Jack Anderson, et al.

EXHIBIT A

[SEAL]

July 17, 1975

R. Stan Mortenson
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W., Suite 500
Washington, D.C. 20037

Dear Mr. Mortenson:

1. There are no restricted materials in Mr. Hoover's Presidential Papers.

2. Since the Hoover Papers were opened to research in 1966, no person has been denied access to the Hoover Presidential Papers.

3. Upon the death of Herbert Hoover, Jr. and Lewis Strauss, replacements to the Coordinating Committee were appointed by Allan Hoover, in accordance with his father's wishes as expressed in Herbert Hoover's letter of December 15, 1960 to GSA Administrator, Franklin Floete. Allan Hoover has the sole authority to make such appointments.

   Mr. Duane Arnold replaced Herbert Hoover, Jr., and Mr. David Packard replaced Lewis L. Strauss. The five members of the Coordinating Committee are listed on the attached page.

4. No Presidential Papers have been restricted by the Coordinating Committee. The only papers now restricted are private and personal papers not related to Mr. Hoover's government service.

   The Coordinating Committee during my tenure as director has functioned only to remove restrictions remaining on the Post Presidential Papers of Herbert Hoover.

5. From 1933 to 1966 Mr. Hoover's papers were not generally available to the public without a grant of access by former President Hoover. During this period a number of scholars were granted access by Mr. Hoover. The following publications were based, wholly or in part, on the Hoover Presidential Papers:

1934. *The State Papers of Herbert Hoover,* by William Starr Myers.

1936. *The Hoover Administration,* by William Starr Myers and Walter Newton.

1937. *The Hoover Policies,* by Ray Lyman Wilbur and Arthur M. Hyde.

1940. *The Foreign Policies of Herbert Hoover,* by Wm. Starr Myers.

1951. *Herbert Hoover's Latin American Policy,* by Alexander DeConde.

1957. *American Diplomacy in the Great Depression,* by Robert H. Ferrell.

1960. *Herbert Hoover and Germany,* by Louis H. Lochner.

In 1956, Professor E.E. Robinson, of Stanford University, was granted access to the Presidential Papers by Mr. Hoover, but he did not publish.

6. I do not have any knowledge of, nor do I have any reason to believe, that any part of the Hoover Presidential Papers were retained or destroyed by Mr. Hoover or any members of the Hoover family.

Sincerely,
/s/Thomas T. Thalken
THOMAS T. THALKEN
Director

COORDINATING COMMITTEE
Herbert Hoover Presidential Library

DUANE ARNOLD
Iowa Electric Light & Power Co.
P. O. Box 351
Cedar Rapids, Iowa 52406

WILLIAM B. COBERLY, JR.
626 Wilshire Boulevard
Los Angeles, California 90017

ROBERT K. GOODWIN
506 Hubbell Building
Des Moines, Iowa 50309

ALLAN HOOVER
25 Field Point Road
Greenwich, Connecticut 06830

DAVID PACKARD
1501 Page Mill Road
Palo Alto, California 94304

EXHIBIT B

[SEAL]

July 23, 1975

Mr. R. Stan Mortenson
Miller, Cassidy, Larroca and Lewin
2555 M Street, N.W.—Suite 500
Washington, D.C. 20037

Dear Mr. Mortenson:

After consultation with and on the advice of Counsel of the Department of Justice assigned to C.A. #74-1852

(Richard Nixon v. Administrator of General Services *et al.*) I write in response to your letter of June 11, which raises questions concerning the actions of President Roosevelt and his family in the disposition of his Presidential materials.

I should make the following observations. I have held this position only since July 1, 1974. My predecessor died in November, 1973. The man who was Director longest (from 1948 to 1961) died in early June. The most senior member of our present staff concerned with such matters dates back only to 1964. Thus to the extent that answers to your questions depend on the memory of individuals there are, unfortunately, gaps in our array. We have made the fullest search of our files possible in the time available. The information I have provided below is accurate as far as it goes but I should caution you that I cannot affirm on the basis of so hurried a search that it is absolutely comprehensive. I will answer your questions in order:

1. Have there been any requests for access to restricted presidential materials of the Roosevelt Administration by officials of subsequent administrations or Members of Congress? If so, please state the circumstances surrounding such requests and the disposition thereof. Please furnish any letters, memoranda or other documents evidencing or relating to such requests and the disposition of such requests.

There are two types of restricted materials among President Roosevelt's papers. One category of restricted materials is that of security-classified documents. Such materials are restricted under the authority of various Executive Orders. The second type is donor-restricted, those materials which, for varying periods of time, are closed in accordance with the instructions of the donor or his agents. In the case of the Roosevelt papers,

responsibility for closing certain documents was assigned to a Committee of Three (Samuel Rosenman, Harry Hopkins and Grace Tully; see Roosevelt memorandum, July 16, 1943). The Committee of Three, reduced by the death of Mr. Hopkins, did not issue its guidelines until November 17, 1949 (see Rosenman and Tully to Grover). The bulk of the Roosevelt collection prevented Rosenman and Tully from making a personal examination, so it was arranged for the Library's archives staff to close such documents as fell within the seven categories enumerated by Rosenman and Tully.

There have been a number of requests for access to security classified documents among the Roosevelt papers by officials of subsequent administrations. A list of those having access to such materials would include President Harry S. Truman, officials of the Department of State, Department of the Army, Department of the Air Force, the Central Intelligencd Agency, and the National Security Agency (see copies of correspondence marked "A".) This listing is merely illustrative, not comprehensive. As to donor-restricted materials I have knowledge of only one instance of access being provided to them. This involved a confidential report to President Roosevelt in 1933 which was requested in 1953 by Mr. Charles F. Willis, special assistant to President Eisenhower, and was provided to him. Correspondence bearing on this matter is attached (Willis, Kahn, Grover, August and September, 1953). I have no knowledge of the grounds for this request or the further disposition of this material.

2. Have any persons other than government employees or officials requested access to the Roosevelt presidential papers and been denied acccess by Mr. Roosevelt or members of his family? If so, please state the circumstances and furnish any documents evidencing or relating to such a request and denial.

The answer to this question is in the negative. The question of denying or permitting access to restricted documents in the Roosevelt papers is properly the responsibility of the Director of the Library. The family of Franklin Roosevelt has not involved itself in these matters nor could it be allowed to do so under the Library's procedures governing access.

3. Since the conclusion of President Roosevelt's term in office, have any members of his family or other persons been given access to restricted materials of the Roosevelt Administration which are not (or were not at the time of such access) generally available to other members of the public? If so, please state the name of that person or family member, whether he or she used such access for purposes of research preliminary to publication of writings, and the name of the person who authorized such access.

Elliott Roosevelt, in collaboration with Joseph P. Lash, produced a four-volume work, *F.D.R.: His Personal Letters* (N.Y.: 1947-1950). We have no evidence that either of them had access to papers in the Library at that time not available to others.

Many non-official researchers, several hundred at the least, have received permission to examine security-classified material in the Roosebelt Library. Each had received permission from the agency of origin or jurisdiction to examine that agency's security-classified documents in the Roosevelt papers. During 1971, to cite

an example, our records show that 45 non-official researchers received 56 clearances to examine State (41), Army (10), Navy (4), and Air Force (1) classified material.

4. Did Mr. Roosevelt or any member of the Roosevelt family retain or dispose of any of the presidential materials, official or personal, of the Roosevelt Administration?

Certain letters among the Presidential materials at the time of Mr. Roosevelt's death were deemed to be personal family correspondence and were turned over to the Roosevelt family by the Library in 1948 (memorandum, Edgar B. Nixon, June 18, 1948). This material was returned to the Library from the five children of President and Mrs. Roosevelt since that time. This material includes correspondence between the President and his parents, wife and children (Kahn to Halsted, November 24, 1954).

4. Continued . . . Did the Roosevelt Library, at its inception, receive possession of all the presidential materials of the Roosevelt Administration? If not, please identify the custodian of those papers during the time in which they were not included in the Roosevelt Library and describe the circumstances under which the Library received custody of the materials.

The building which houses the Roosevelt Library was completed in 1940. Roosevelt began early in 1941 to transfer some of his earlier correspondence to the Library but the bulk of his White House papers had not been so transferred at the time of his death in 1945. After his death his White House papers were moved to the National Archives building where they remained in storage until December, 1946, at which time they were transferred to the Roosevelt Library to await legal decisions as to their ownership. However, there was a notable exception to

this. The "Map Room" files, which contain the diplomatic and military papers relating to the President's conduct of World War II, were retained in Washington on the instructions of President Truman and were not transferred to the Library until November, 1951.

I hope that this information will be helpful to you.

Very sincerely yours,

/s/William R. Emerson
WILLIAM R. EMERSON
Director

EXHIBIT C

[SEAL]

UNITED STATES OF AMERICA
General Services Administration
National Archives and Records Service
Harry S. Truman Library
Independence, Missouri 64050

July 23, 1975

Mr. R. Stan Mortenson
Miller, Cassidy, Larroca and Lewin
2555 M Street, N. W.
Washington, D.C. 20037

Dear Mr. Mortenson:

In replying to your letter of June 11, 1975, I would first like to point out that, while President Truman donated the great bulk of his White House papers to the Government in 1957, he did retain during his lifetime in his private suite in the Library, the file that was

maintained in the White House by his personal secretary, Miss Rose Conway. These files, generally referred to as the President's Secretary's Files, were turned over to us and became the property of the Federal Government on November 26, 1974 in accordance with the terms of Mr. Truman's will.

Portions of the materials donated to the Library by President Truman in 1957 are restricted for the present in accordance with his instructions. Such restricted materials include: (a) papers classified as to secrecy and security pursuant to law and (b) papers which may in any manner injure, embarrass, or harass, any living person or the living members of the family of any deceased person, or papers which may in any manner be prejudicial to the conduct of foreign relations with any government and, papers containing statements made by or to President Truman in confidence in any official capacity.

1. There have been no requests from officials of subsequent administrations for access to the material donated to the United States in 1957 and restricted under the terms of the deed of gift. In the time since the President's Secretary's Files were turned over to the Library on November 26, 1974, in accordance with the terms of Mr. Truman's will, there have been requests for access to these files by departmental historians from the Departments of State and Defense. Both requests have been denied pending processing. There have been no requests for access to restricted material in either the 1957 or the 1974 donation by Members of Congress. It is our understanding that President Truman did permit officials from the Department of State's Historical Office to examine the President's Secretary's Files while they were still in his possession in connection with the preparation of the 1945 volume of that Department's *Foreign Relations* series. (see *Foreign Relations of the*

United States, Conference of Berlin (Potsdam), I, pp. XIII-XIV attached).

2. Material which is restricted under the terms of President Truman's 1957 deed of gift and his will is routinely denied to persons other than government employees. These denials are handled by the Library staff as agents of Mr. Truman. It is also our understanding that after he left office, President Truman received a number of requests from persons other than government employees to examine the President's Secretary's Files in connection with various research projects. (see letter dated February 11, 1966 from Philip C. Brooks, Director, Harry S. Truman Library, to Herbert Feis, copy attached).

3. In 1973, President Truman permitted his daughter, Mrs. Clifton Daniel, access to the Presidential papers retained by him after he left office in connection with the preparation of her biography *Harry S. Truman* (New York: Morrow, 1973). We have no knowledge of any other person being granted access to the President's Secretary's Files prior too Mr. Truman's death.

4. Under the terms of his will, President Truman bequeathed to the United States Government all of his papers as United States Senator, Vice President and President not already given to the Federal Government "other those therof (a) which shall contain a label showing a reservation of title in me, (b) which shall be determined by my Executors in their sole and absolute discretion to be related in whoie or in part to the business or personal affairs of myself or any of the members of my family (which shall, for the purpose of this will, include my wife, daughter, brother, sister, nephews and nieces)." Under the provisions enumerated under (a) and (b) above a small quantity of materials has been retained by the Truman family.

Sincerely,

/s/ Benedict K. Zobrist
BENEDICT K. ZOBRIST
Director

Enclosures

Foreign Relations
of the
United States
Diplomatic Papers

The Conference of Berlin
(The Potsdam Conference)
1945
(In Two Volumes)

Volume I

[SEAL]

United States
Government Printing Office
Washington: 1960
[EXCERPTS]

INTRODUCTION

[XIII] background material, did not present an adequate picture of the status of an individual question on the eve of the Conference, key documents of earlier date have been quoted or summarized in the footnotes in this volume.

In accordance with the regulation quoted above, because the Berlin Conference dealt importantly with military as well as political problems, the Department of State asked for and received the cooperation of the Department of Defense in locating and releasing for publication documents relating to the military aspects of the Conference. So far at this volume is concerend, this type of material consists of papers documenting the official position or advice of the War and Navy Departments on politico-military subjects later discussed at the international level at the Berlin Conference, as presented by the civilian leaders of those Departments and by the military chiefs in their capacity as members of the Joint Chiefs of Staff and Combined Chiefs of Staff. In addition, some papers originating with or transmitted by military authorities below these levels have been included in order to clarify references in other papers or to set forth information pertinent to the Conference given to the President or his principal advisers but inadequately reflected in Department of State papers.

SOURCES

The papers printed in this volume (except for a very few items reprinted from published sources) were drawn from the following files and collections of official and private papers:

A. INSIDE THE DEPARTMENT OF STATE

1. *Indexed Central Files*—Papers in the indexed Central Files of the Department State are indicated by a file number in the headnote, in the usual style of *Foreign Relations* volumes. The most important single item from the indexed Central Files used in preparing this volume was a "Briefing Book"—actually five notebooks of background information an recommendations—prepared

in the Department of State for the guidance of the Secretary of State and the President. This "Briefing Book" bears a single file number, and papers drawn from it are identified not only by that number but also by the editor's heading "Briefing Book Paper". A considerable number of documents (such as the translations of Japanese Foreign Ministry papers printed on pages 874-883) were not originally in the Central Files of the Department but have now been indexed and deposited in the Central Files.

2. *Staff Committee Files*—A collection of unindexed papers in the Records Service Center of the Department containing the minutes and documents of the Secretary's Staff Commitee, a body which included [XIV] the Secretary of State and the Assistant Secretaries, or their representatives.

3. *Coordinating Committee Files*—A collection of unindexed papers in the Records Service Center containing documents of the Coordinating Committee, a body which included the Under Secretary of State and officials of the Department at the level of office director.

4. *IPCOG Files*—A collection of unindexed papers in the Records Service Center containing the papers pertaining to the interdepartmental Informal Policy Committee on Germany.

5. *Pauley Files*—A collection of unindexed papers in the Records Service Center containing the office files of the United States Representative on the Allied Commission on Reparations, Edwin W. Pauley.

6. *Moscow Embassy Files*—The files for 1945, now in the Records Service Center, of the American Embassy at Moscow.

7. *London Embassy Files*—The files for 1945, now in the Records Service Center, of the American Embassy at London.

8. *Frankfurt USPdAd Files*—The files for 1945, now in the Records Service Center, of the Office of the United States Political Adviser at Frankfurt.

9. *LJT Files*—The office files of the Assistant Legal Adviser for Treaty Affairs.

10. *SJAE Files*—The office files of the Special Assistant to the Secretary of State for Disarmament and Atomic Energy.

B. OUTSIDE THE DEPARTMENT OF STATE

1. *Truman Papers*—The private papers of former President Harry S. Truman. Photocopies of some of these papers were obtained by the Department of State while Mr. Truman was still in office, and others were obtained from Mr. Truman's office in Kansas City, Missouri, in 1956.

2. *Leaky Papers*—A collection of official papers, now in the custody of the Joint Chiefs of Staff, from the office of the Chief of Staff to the Commander in Chief of the Army and Navy, the late Fleet Admiral William D. Leahy.

3. *J.C.S. Files*—The files of the Joint Chiefs of Staff. These files provided not only Joint Chiefs of Staff material but also Combined Chiefs of Staff documentation. The approval of the British Chiefs of Staff, along with that of the United States Joint Chiefs of Staff, was obtained for the declassification of Combined Chiefs of Staff documentation.

4. *Department of the Army Files*—These files provided, for this volume, several messages exchanged between United States Army officers in the field and the War Department.

5. *White House Files*—The list of the President's

party printed as document No. 115 came from the files of the White House.

February 11, 1966

Professor Herbert Feis
P.O. Box 417
St. John's, Antigua, W.I.

Dear Professor Feis:

We appreciate your interest in doing research in the Truman Library, even though I cannot be encouraging to you at this time. There is no change in the situation regarding the papers of former President Truman himself since you were here some years ago. When he left the Presidency he retained (as there is reason to think any President would) in his personal files a comparatively small amount of material that either he used in writing his *Memoirs* or was filed in his own immediate office when he was President. He has said a number of times that he is not going to make this material available to any one during his lifetime and he has been quite consistent about this.

There is in the Library itself a large quantity of valuable material, consisting primarily of the general files of the White House and the files of a number of White House staff members. In recent years, we have acquired papers of a number of other persons who were associated with Mr. Truman while he was President and we have been assured that we will receive several other bodies of papers.

We are enclosing a copy of our latest Newsletter, an informal occasional issuance of the Truman Library Institute, which contains a list of the historical groups in the Library.

If we can be of assistance in your research, we shall be happy to do so.

Very sincerely,

Enclosure

Philip C. Brooks
Director

GENERAL SERVICES ADMINISTRATION
National Archives and Record Service
Dwight D. Eisenhower Library
Abilene, Kansas 67410

EXHIBIT D

[SEAL]

July 18, 1975

Mr. R. Stan Mortenson
Miller, Cassidy, Larroca & Lewin
2555 M Street, NW
Washington, DC 20036

Dear Mr. Mortenson:

This letter is in response to your letter concerning litigation between President Richard Nixon and disposition of his presidential materials. The Eisenhower Library was asked to respond to specific questions and provide certain information concerning practices of the Eisenhower Library with Mr. Eisenhower's papers.

The responses to those questions are as follows:

1) Official agency historians have requested and been granted access to restricted presidential materials for work on officially approved projects. There have been no other requests for access to restricted presidential materials of the Eisenhower Administration by officials

of subsequent administrations or members of Congress. Occasionally there have been approaches made by telephone, but once they learned that the material was restricted there was no follow-up in seeking access. In nearly every case the request was made by phone on a preliminary basis that did not require any documentation as to action.

2) There have been requests by researchers other than government employees or officials for access to the Eisennower Presidential Papers which are donor restricted. It is Library procedure to direct such requests to John S. D. Eisenhower, who under the Deed of Gift transferring the papers of President Eisenhower to the United States, is the designated person who authorizes access to donor restricted materials and controls literary property rights. Unless such material can be opened on an equal access basis these requests are denied by John S. D. Eisenhower in his capacity as Chairman of the Eisenhower Manuscript Committee. Because these requests are referred directly to Mr. Eisenhower, the Library does not hold copies of correspondence between the researcher and Mr. Eisenhower beyond the initial inquiry.

3) Since the conclusion of General Eisenhower's term in office, John S. D. Eisenhower has had access to restricted material of the Eisenhower Administration which is not generally available to the other members of the general public. This access has been in connection with his role as Chairman of the Eisenhower Manuscript Committee. General Eisenhower himself used the materials known as the Personal Papers of the President (Whitman File) to write his memoirs of his terms in office. John S. D. Eisenhower has subsequently used, though infrequently, some materials in his publications, namely *Strictly Personal.* John S. D. Eisenhower is the only such person to have this access. This right, according to Section 11 of

the Deed of Gift, was reserved for both General Eisenhower and his heirs to "make use of any of these papers in writing for publication."

4) Mr. Eisenhower did retain a collection of papers known as the Gettysburg File (Whitman File) in his residence at Gettysburg, Pennsylvania. The Dwight D. Eisenhower Library received the White House Central Files, the files of the White House administrative offices, and most of the White House staff files. The remaining files from the White House with the exception of the DDE office files (Ann Whitman Files) were sent to Fort Ritchie. This file was subsequently sent to Gettysburg in March 1961, for use by the President in writing his memoirs. In April 1967, the sensitive staff files stored at Fort Ritchie since 1961, were sent to NLE, along with some AEC materials and other restricted data information. At the time of the death of President Eisenhower in 1969, the Whitman File was sent to Abilene, that being the only remaining file of presidential materials outstanding. That file was maintained in Gettysburg for the President's convenience under terms of the Letter of Gift executed in April of 1960. To the best of our knowledge, President Eisenhower did not dispose of any of the presidential materials, official or personal, that were in his possession.

Sincerely yours,

/s/John E. Wickman
JOHN E. WICKMAN, Director
Dwight D. Eisenhower Library

EXHIBIT E

[SEAL]

July 23, 1975

Mr. R. Stan Mortenson
Miller, Cassidy, Larroca & Lewin
2555 M Street, NW
Washington, DC 20037

Re: Richard Nixon v. Administrator of General Services, et al. (USDC D DC), Civil Action No. 74-1852.

Dear Mr. Mortenson:

The following information is provided in response to the questions you raised in your letter of June 11, 1975.

Question No. 1: I assume that by "restricted presidential materials" you are referring to documents which have been closed by the Library staff working with the Donors' Committee under the terms of the instrument by which President Kennedy's papers were deposited in the Library. To the best of my knowledge, we have had no specific requests from government officials for access to non-classified restricted presidential materials which were not available to the public.

We have had on the other hand, inquiries from time to time from officials of subsequent administrations and members of Congress about the availability of various materials in the Library. This has included requests for access to security classified documents from persons within the government (or on contract with a government agency) on approximately 4 occasions that we have been able to locate to date.

Question No. 2: To my knowledge, there have been no situations where a request for access to closed materials

was made to officials of the National Archives and Records Service and then denied by the Donors' Committee. You will have to check with individuals who have served on the Donors' Committee for President Kennedy's papers and with members of the Kennedy family, to determine whether or not any requests have been made directly to them.

Question No. 3: The following persons have served on the Committee appointed by the donors of the papers of President Kennedy: Burke Marshall (Chairman), Herman Kahn (who died in June, 1975); Byron White (who resigned in April, 1971); Theodore Sorensen (who was appointed in May, 1971). Mr. Kahn's replacement has not yet been appointed.

Question No. 4: Enclosed are four documents relating to the disposition of President Kennedy's papers.

Question No. 5: There have been a total of three meetings of all members of the Donors' Committee. Those attending these meetings were:

(a) July 18-19, 1969—Marshall, Kahn and White and John Stewart and Francis Harrington (Library staff)

(b) April 14, 1970—Marshall, Kahn, and White and Stewart and Harrington

(c) July 12, 1972—Marshall, Kahn and Sorensen and Dan Fenn, Stewart and Harrington

At various times, one or two members have come to the Library to review materials and offer their recommendations. At both the formal meetings and the visits of individual members, a sample of documents we were recommending be opened was reviewed, as well as a sampling of those documents we were recommending to be closed. On occasion, we have consulted with members of the Donors' Committee by telephone or informal

letter. In a few cases, we have physically sent copies of the materials to members of the Donors' Committee, soliciting their opinions on openings or closings. In most instances, the review has taken place at the Kennedy Library. The Committee has delegated to the Library staff the authority to remove restrictions and to open materials formally closed in the course of the initial review and materials which had been classified and then declassified.

Question No. 6: Since September, 1969, when the Kennedy Library began its operations as a presidential library, no individual has been given access to materials which were not generally available to everyone, except for the government researchers referred to in answer to question 1 above who had access to classified documents. Prior to that date, we know of no special access except for one document in our files which states that Mr. Theodore White obtained permission from Robert Kennedy in December, 1965, to examine certain papers of President Kennedy. The document does not state the purpose of the research.

Question No. 7: Certain objects (mainly in the form of memorabilia) and papers relating to the private affairs of President Kennedy were excluded from the materials deposited with the United States Government by the instrument dated February 25, 1965. Although the National Archives and Records Service did not have complete custody of all of the materials from November 22, 1963 until the actual effective date of the deposit, February 25, 1965, we have no reason to believe that we did not receive all the presidential materials of the Kennedy Administration. During this period of time, some of these materials were in the custody of Mrs. Evelyn Lincoln, President Kennedy's former secretary, and some remained at the White House.

Yours very truly,

/s/Dan H. Fenn, Jr.
DAN H. FENN, JR.
Director, Kennedy Library

EXHIBIT F

[SEAL]

THE LYNDON BAINES JOHNSON LIBRARY

Austin, Texas
July 14, 1975

Mr. R. Stan Mortenson
Miller, Cassidy, Larroca and Lewin
2555 M Street, Northwest
Suite 500
Washington, D. C. 20037

Dear Mr. Mortenson:

With response to your letter of June 11, the numbered paragraphs in this letter will correspond to the similar paragraphs in yours.

1. Requests for access to restricted materials in this Library have been received from the following Members of Congress:

– Senator William J. Fulbright, Chairman of the Senate Committee on Foreign Relations, June 14, 1972

– Senator Adlai Stevenson III, July 19 and 28, 1972

Copies of the exchanges of correspondence pertaining to these requests are attached.

2. After President Johnson's death, a Library employee who had worked for Mr. Johnson for many years presented me with eight sealed Records Center cartons (each one cubic foot in size) which she said contained selected telephone conversations between President Johnson and other persons, some of which had been recorded manually by a secretary, and some by dictaphone belts, and a limited number of meetings recorded in the Cabinet Room in 1968, mostly concerned with national security matters. Along with these was a signed statement that Mr. Johnson had committed the materials in the cartons to her personal care with instructions that if they were still in her personal care at the time of his death, she should turn them over to the Director of the Library with instructions that they be kept sealed for fifty years. Because they came to my care sealed, and have remained sealed, I have no knowledge of the general nature of the conversations contained on the recordings. Attached is a copy of the statement I have made publicly relating to this material.

3. During the period of his retirement, former President Johnson had access to materials on deposit in the Library, which he used in the preparation of his memoirs. Other persons with similar access were those who assisted Mr. Johnson in his writing—and for that specific purpose. Those persons included: W. Thomas Johnson, Robert Hardesty, William Jorden, Walt W. Rostow, Doris Kearns, and myself. Professional archivists on the staff of the Library also had access, of course, which they used to process the materials and perform reference service for the former President and his assistants.

4. Of the 31 million pages on deposit in the Library, 21 million are considered to be President Johnson's personal papers. (The remainder are copies of Federal records, and papers donated to the Library by other persons.) A relatively small percentage of papers were given to the U.S. government by President Johnson during his lifetime; title to the remainder passed to the government under the terms of Mr. Johnson's last will and testament.

All the papers mentioned in the paragraph above were transferred to Austin, Texas, at the end of the Johnson Administration. Until the construction of the Library was completed, in May 1971, the papers were stored, and the Library staff was housed, in the Federal Building in Austin. Since then, the materials have been in the Library. From the end of the Johnson Administration, the Director of the Library has been consistently the custodian of all papers, except for two bodies of material. Those mentioned in paragraph 2 of this letter comprise one of the exceptions. The other was a sealed envelope which was turned over to me after President Johnson's death by a former White House aide who came to Texas to serve as consultant to former President Johnson. Along with the envelope was a statement signed by the aide that the envelope incuded materials which in President Johnson's judgment were of a sensitive nature and which should be handled as a matter of national security; these materials, the statement said, had been committed by Mr. Johnson to the aide's personal care with instructions that if they were still in his care at the time of Mr. Johnson's death, they should be consigned to the Library under conditions the aide judged to be appropriate; accordingly, the statement presented the recommendation that the papers be kept sealed for fifty years.

I hope you will find this a satisfactory response to the questions raised in your letter.

Sincerely,

/s/Harry J. Middleton
Harry J. Middleton
Director

Enclosure

cc: Peter M. Kreindler, Esquire
Irwin Goldbloom, Esquire
William A. Dobrovir, Esquire

August 3, 1972

Dear Senator Stevenson:

In response to your letters of July 19 and July 28, I am afraid I must give you a disappointing reply.

We have received, and I'm sure will continue to receive, a number of requests similar to yours. I think a certain amount of background information on the procedure for organizing and processing the papers on deposit in this Library will be helpful to you in understanding why it is not possible for us to make an affirmative response to these requests.

The task of organizing, reviewing and making available for research the 31 million papers in the Library's collections is an enormous undertaking. The size of the task required, early in the Library's operation, that we establish a set of priorities for staff work and determine a schedule for opening the documents.

This was similar to the needs that other Presidential Libraries before us had recognized, and our conclusions were consistent with the ones arrived at by those institutions: We decided to concentrate first on processing and organizing the papers which could be opened most quickly—the papers concerned with domestic policy. This process has begun—we opened our first group of papers, those on Education, earlier this year—and it will continue over the next several years.

As soon as it is practical and feasible, we will move into the area of organizing and readying for review the materials relating to foreign relations. Those materials, however, present problems of substantial complications, because of the classification of many of the documents by different agencies and departments of government; because of their sensitivity; and because of their bearing on present U. S. relations with other countries.

In view of these circumstances, and following the procedures established in other Presidential Libraries, even after the task of organizing the foreign policy papers is completed, the Library itself cannot be the sole determiner of when those papers will be made available. That determination must be made in close consultation with those agencies of government having primary responsibility for the conduct of the Nation's defense and foreign affairs, and with consideration for the status of our continuing relationships with other countries.

At that time, the papers that are opened for review will be made available to all qualified researchers. Regulations established by The National Archives, following the dictates of the Freedom of Information Act, forbid our making certain papers available to individuals on a selective basis.

I hope that the foregoing reasons will give you a clearer understanding of why we are unable to respond in the

affirmative to your request. This answer comes to you with my personal regrets, and my best wishes.

Sincerely yours,

Harry Middleton
Director

Honorable Adlai E. Stevenson III
United States Senate
Washington, D. C. 20510

HM:jh

United States Senate
Washington, D.C. 20510

July 19, 1972

Mr. Harry Middleton
Director, Lyndon B. Johnson Library
University of Texas
Austin, Texas

Dear Mr. Middleton:

In the latter part of 1964 and early 1965 my father and Secretary General U Thant were involved in a Vietnam peace initiative. The history of this affair is murky for my father was the only person with complete knowledge of the initiative from both ends—Thant and Washington. Unfortunately, he wrote only a few memos about the affair and these undoubtedly were classified by the government immediately after his death.

Harlan Cleveland states that my father wrote a memo about the peace initiative to the White House on February 17, 1965.

There is also a State Department memo, probably written about the same time, from Secretary Rusk to McGeorge Bundy outlining, somewhat critically I understand, the State Department's view of this affair.

This initiative is not discussed in the "Pentagon Papers." Efforts to locate these memos and otherwise clear up the historical record have not been successful. I would be most grateful for any help you could give me.

Do you know where I would be able to obtain copies of the Rusk memo and the memo my father sent to the White House? Are you familiar with any other memos or documents written during this time about this intiative? Are there any personal recollections you could share with me about this matter?

Many thanks for any help you can give me.

Sincerely,

/s/[ILLEGIBLE]

United States Senate
Washington, D.C. 20510

July 28, 1972

Mr. Harry Middleton
Director
Lyndon B. Johnson Library
University of Texas
Austin, Texas

Dear Mr. Middleton:

I have been told that the memos by my father and Secretary Rusk which are referred to in my letter of July 19 were received by McGeorge Bundy and have been transferred to your possession at the Library. I have no idea what the ground rules are. If they are classified, perhaps something could be done at this end to release them. Be that as it may, I would be most grateful if you could help. My father's biography is now being edited. His edited writings are also being published. And the absence of his memo leaves a large gap in the historical record. It has been confirmed that the memo never reached President Johnson, so I don't see how his interests are affected. My concerns are twofold, to preserve the history and my father's place in it.

Ever so many thanks for any help you can give me.

Sincerely,

/s/[Illegible]

July 5, 1972

Dear Mr. Chairman:

I am writing in response to your letter of June 14. Your request in this regard is understandable, as are a large number of similar requests which we have received. However, I must give you the same reply I have given to the others, which is that we cannot accede to the request at this time.

The task of organizing, reviewing and making available for research the 31 million papers in the Library's collections is an enormous undertaking. The size of the

task required, early in the Library's operation, that we establish a set of priorities for staff work and determine a schedule for opening the documents.

This was similar to the needs that other Presidential Libraries before us had recognized, and our conclusions were consistent with the ones arrived at by those institutions: We decided to concentrate first on processing and organizing the papers which could be opened most quickly—the papers concerned with domestic policy. This process has begun—we opened our first group of papers, those on Education, earlier this year—and it will continue over the next several years.

As soon as it is practical and feasible, we will move into the area of organizing and readying for review the materials relating to foreign relations. Those materials, however, present problems of substantial complications, because of the classification of many of the documents by different agencies and departments of government; because of their sensitivity; and because of their bearing on present U.S. relations with other countries.

In view of these circumstances, and following the procedures established in other Presidential Libraries, President Johnson, the Archivist of the United States, and I are agreed that even after the task of organizing the foreign policy papers is completed, the Library cannot be the sole determiner of when those papers will be made available. That determination must be made in close consultation with those agencies of government having primary responsibility for the conduct of the Nation's defense and foreign affairs, and with consideration for the status of our continuing relationships with other countries.

For the foregoing reasons, I am sure you will understand why we are unable to respond in the affirmative to your

request. I look forward to the day when ultimately all of the papers in the Library can be made available.

Sincerely yours,

Harry Middleton
Director

Honorable J. W. Fulbright
Chairman
Committee on Foreign Relations
United States Senate
Washington, D. C. 20510

HM:njh

United States Senate
Committee on Foreign Relations
Washington, D.C. 20510

June 14, 1972

Mr. Harry Middleton
Director, Lyndon Baines
Johnson Library
Austin, Texas 78712

Dear Mr. Middleton:

As you may know, staff members of the Committee on Foreign Relations are examining American involvement in Indochina. In their studies they are using the documents and analyses of the "Pentagon Papers" as well as other relevant sources.

The Pentagon Papers have proved to be a valuable source of information but unfortunately they contain

few documents relating to Vietnam policy in the Johnson Administration. I would appreciate the Library furnishing Committee researchers with documents in the possession of the LBJ Library which relate to this period and which might be useful to their studies. In particular, the Committee researchers would like to have access to the papers analyzing the major military and foreign policy decisions of the Johnson Administration converning Vietnam and supporting documentation compiled in the Administration's last months.

It has been called to my attention that among other studies, the State Department and White House staff prepared thoroughly documented studies on the 1964 Tonkin Gulf crisis and the Administration's decision to send large forces to Vietnam. The Committee would appreciate receiving these also.

Since some of these documents and analyses are still sensitive, our staff people, who are cleared for Top Secret work through the Department of Defense, will naturally accord them the respect due sensitive documents.

Sincerely yours,

/s/J. W. Fulbright
J. W. Fulbright
Chairman

STATEMENT MADE BY HARRY J. MIDDLETON

There is a section of materials in the Lyndon Baines Johnson Library which reflect:

A. selected telephone conversations between the President and other persons; some of these were recorded manually by a secretary, some by dictaphone belts.

B. a limited number of meetings recorded in 1968 in the Cabinet Room; most of these concerned national security matters.

EXHIBIT G

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D.C. 20530

[SEAL]

August 12, 1975

Address Reply to the
Division Indicated
and Refer to Initials and Number
DJA:mae
145-171-137

R. Stan Mortenson, Esquire
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Suite 500
Washington, D. C. 20037

Re: Richard Nixon v. Administrator of General Services, et al. (USDC D. D.C.) Civil Action No. 74-1852.

Dear Mr. Mortenson:

As you requested, I have obtained some additional information from the Directors of the presidential libraries whose affidavits we submitted in this action. I understand that this information is intended to clarify certain aspects of those affidavits and will obviate the need for any cross-examination by deposition. I further understand that you will prepare a stipulation by which the parties will agree that the affiants would have

testified to the following as on cross-examination, had they been called in this case, and that their affidavits will represent their direct testimony.

I. Questions Submitted For HARRY J. MIDDLETON

1. What was the nature and extent of Mr. Middleton's relationship with President Johnson prior to President Johnson's death.

ANSWER: From early 1967 until the end of the Johnson Administration, Mr. Middleton served on President Johnson's staff in the White House (his title was Staff Assistant to the President). In January 1968, Mr. Middleton went to Texas with Mr. Johnson at his request, and served on the staff of the former President until he was appointed Director of the Library on May 18, 1970.

2. What role, if any, did President Johnson have in selecting any of the staff (including Chester Newland and other administrative personnel).

ANSWER: Mr. Middleton can speak with authority on President Johnson's role only from the beginning of his directorship of the Library. He is aware, of course, that Mr. Johnson recommended him to be the Director to succeed Dr. C. Newland. At the beginning of the next fiscal year, after Mr. Middleton became Director on July 1, 1970, five members of the staff of the former President Mary Rather, Mildred Steagall, Ruby L. Nivens, Elizabeth Tilson, and Willie Day Taylor, were transferred to the staff of the Library. These transfers were made with the knowledge and approval of Mr. Johnson. He played no other role thereafter in the selection of staff. (Of these five persons, all but Elizabeth Tilson have since retired from the Library staff; Mrs. Tilson remains on the staff).

3. Were Dr. Dougall and Dr. Costrell (the State Department employees referred to in ¶ 7 of Middleton's affidavit) denied access to the materials they wanted to see because the Library believed that some of the material might be properly classifiable as donor-restricted but had not to that time been processed by the archivists.

ANSWER: The reason given to Doctors Dougall and Costrell was that the material had not been reviewed for donor restrictions.

4. What were the stated purposes of Doctors Dougall and Costrell's request for access.

ANSWER: A State Department historical project concerning American policy toward China.

5. Were Doctors Dougall and Costrell subsequently provided access to *all* of the materials they had previously requested.

ANSWER: No.

6. Was the Church Committee staff member referred to in ¶ 7 of Middleton's affidavit given access to any donor-restricted material. If so, what purposes were outlined in obtaining the consent of library personnel or any other person to permit such access.

ANSWER: No.

7. Have there been any requests for access to the Johnson tape recordings which were held by the Library under a 50-year seal.

ANSWER: No.

8. What is the Library's position concerning requests for access to these recordings by a) Members of Congress or their staffs, or b) members of the incumbent Administration. Would such requests be referred to members of the Johnson family or any person not associated with the General Services Administration.

ANSWER: To *any* requests for access to the materials mentioned in question 7, the Library's position would be that we consider President Johnson's wishes, as transmitted after his death, to be binding, and we would honor them insofar as possible. I know of no reason why such requests would have to be discussed with members of the Johnson family, or any persons not associated with GSA.

9. The same questions as set forth in ¶ 8 above with respect to the sealed envelope received by Mr. Middleton after President Johnson's death and referred to in his letter to me of July 14, 1975.

ANSWER: In essence, the answer given above applies also to the materials mentioned in question 9.

II. Questions Submitted For JOHN STEWART

1. Of the 85% of the total volume Kennedy presidential papers processed to date, approximately what percentage is presently under donor-restriction?

ANSWER: A total of 4,400 boxes of President Kennedy's papers have been completely processed (screened). Approximately 30 boxes of material were closed, under donor restrictions (.6%).

2. Do members of the Church Committee referred to in Paragraph 6 of the Stewart Affidavit, or any other persons listed in that paragraph, have access to donor-restricted material? If so, explain the statement by Mr. Dan Fenn, Director of the Kennedy Library, in his letter to me of July 23, 1975 in which he states that he has no knowledge of requests by Government officials for access to non-classified, restricted presidential materials which are not available to the public.

ANSWER: The Church Committee has not had any

access to donor restricted material; none of the files of interest to the Committee contained material of this nature.

3. If the Church Committee staff or any other person has access to donor-restricted material, state what material and describe the procedures that were followed in their obtaining that access.

ANSWER: Aside from archival personnel, members of the Donors Committee, and the individual mentioned in paragraph 7 below, neither the Church Committee staff nor any other person has had access to donor-restricted material.

4. Are there any portions of the Kennedy presidential materials which members of the library staff have not been permitted to review because of conditions placed upon the donation of the materials?

ANSWER: All of the material donated to the Government by the instrument of gift of February 1965, has been available for review by the library staff. Certain material not covered by that instrument has not been available. (See Answer to question 5 below).

5. Are there any portions of the Kennedy presidential materials which were pre-screened by members of the Kennedy family or the donor committee prior to review by the library staff?

ANSWER: Yes, pursuant to the deed of gift.

6. Have there been any requests for access to donor-restricted material? If so, how was that access processed?

ANSWER: The library has had routine inquiries from numerous researchers about individual documents closed in accordance with the terms of the instrument of gift ("donor-restricted"). As a part of our service to

researchers we re-revised closed documents, on request, to determine whether the reason for the initial closing no longer exists so that they can be opened. This has actually happened on only one or two occasions. We have had no formal (i.e., written) requests for access to documents which have been closed.

7. Did Robert Kennedy's permission to Theodore White to utilize the Kennedy presidential materials (which is referred to in Dan Fenn's letter of July 23, 1975) include authorized access to donor-restricted material or other material not available to the general public for reasons other than security classifications?

ANSWER: At the time Theodore White used the Kennedy papers, no restriction had been placed on individual documents. The entire collection was closed because it had not yet been reviewed to identify items which could not be opened.

8. Please provide the four documents concerning disposition of the Kennedy presidential papers referred to in Paragraph 2 of Dan Fenn's letter.

ANSWER: Copies of these documents are attached to this letter.

9. Are there any tape recordings in the possession of the Kennedy Library which include conversations of President Kennedy and others? If so, state the Kennedy Library's extent of knowledge concerning these recordings. Were any such recordings or portions thereof, if they exist, under donor restriction as to access at anytime?

ANSWER: There are 68 dictabelts of telephone conversation and 125 magnetic tapes of meetings between President Kennedy and others which are or have been physically stored in the Kennedy Library but have not yet been turned over to the library. Consequently,

the library staff has only very limited knowledge of their nature and extent. Among the material which has been donated to the library as a part of President Kennedy's papers is one tape of two telephone conversations between President Kennedy and Prime Minister Macmillan (October 1962). This tape (and transcript) is classified as top secret.

III. Questions Submitted For JOHN C. WICKMAN

1. Have the official agency historians referred to in Mr. Wickman's letter to me dated July 18, 1975 had access to donor-restricted material. If so, what was the procedure followed for obtaining permission for that access.

ANSWER: The official agency historians referred to in Mr. Wickman's letter to you on July 18, 1975, did not have access to donor-restricted material. However, since that time historians from the Department of State have received permission from John S. D. Eisenhower to examine donor-restricted material and have done so.

IV. WILLIAM R. EMERSON

Dr. William R. Emerson has knowledge of only one instance of access by officials of subsequent Administrations to donor-restricted material. That instance involved a confidential report to Franklin D. Roosevelt in 1933 which was requested in 1953 by Charles F. Willis, Chief Assistant to President Eisenhower.

Dr. Emerson affirms that the letter from Herman Kahn to Lt. Colonel E. M. Harris dated June 15, 1950 which was attached to his letter to you on July 23, 1975, is a true and accurate copy of that letter as maintained in the Roosevelt Library files.

Yours very truly,

/s/David J. Anderson
David J. Anderson
Special Litigation Counsel
Civil Division

cc: Robert E. Herzstein, Esquire
Arnold and Porter
1229-19th Street, N.W.
Washington, D. C. 20036

cc: William Dobrovir, Esquire
2005 L Street, N.W.
Washington, D. C. 20036

cc: Leon Friedman, Esquire
Hofstra University
School of Law
Southern California Avenue
Hempstead, New York 11550

[Caption Omitted in Printing]

MOTION FOR LEAVE TO WITHDRAW

The Special Prosecutor hereby moves for leave to withdraw from this litigation on the ground that litigation over his interest in the materials that are the subject of the instant case has become moot.

1. The interest of the Special Prosecutor in the Presidential materials of the Nixon Administration has been a well-defined one—to obtain use of the tapes and documents relevant and important to ongoing criminal investigations and prosecutions within the jurisdiction of the Special Prosecutor. The Special Prosecutor's need for

these materials was recognized by President Ford, who authorized his Counsel to enter into an agreement providing the Special Prosecutor access to and use of the materials under carefully delineated procedures. The provisions of this agreement—referred to in these proceedings as the November 9th Agreement—are embodied in the regulations issued by the Administrator under Section 102(d) of the Presidential Recordings and Materials Preservation Act ("the Act") which, in general terms, authorizes access to these materials by executive branch agencies or departments for lawful government use. See 41 C.F.R. §105-63.302-1, 40 Fed. Reg. 2671 (January 14, 1975).

2. Former President Nixon, in the instant litigation, seeks injunctive relief not only against the Act, but also against implementation of the November 9th Agreement. To protect his ability to obtain necessary tapes and documents from the Nixon Administration materials, under both the statute and the November 9th Agreement, the Special Prosecutor sought to intervene in these proceedings. In doing so, he was prepared to argue, as he did earlier in *Nixon v. Sampson*, D.D.C. Civ. No. 74-1518, that whether or not Mr. Nixon has rights in these materials sufficient to prevent access to them by private citizens, he has no right to prevent their lawful use by government agencies, especially in the face of a finding by the incumbent President that their use was necessary to the public interest. The Special Prosecutor, in seeking intervention, also was prepared to argue that the statute itself is a constitutional exercise of power by Congress. This Court granted the Special Prosecutor's motion to intervene by Order dated May 1, 1975.

3. From the outset, however, the Special Prosecutor has stressed in the various proceedings relating to these materials that his need was for *prompt* use of them.

Because immediate implementation of the November 9th Agreement was barred by an existing court order in *Nixon v. Sampson, supra,* the Special Prosecutor entered into discussions with counsel for Mr. Nixon in order to find ways consistent with that order to satisfy the needs of this Office. As a result of those discussions, the Special Prosecutor and counsel for Mr. Nixon agreed upon procedures whereby, with the consent of the incumbent Administration, the Special Prosecutor would receive the tapes and documents he had reason to believe were relevant and important to investigations and trials still being conducted by his Office.

4. These procedures have been implemented to the satisfaction of the Special Prosecutor. All files that were likely to contain documents pertinent to the Special Prosecutor's ongoing, designated investigations have been examined, and all documents from the designated files have been produced to the Special Prosecutor when pertinent to the designated inquiries. In addition, the Special Prosecutor has received or listened to all designated Presidential tape recordings that were arguably relevant to specified investigations.

5. Counsel for Mr. Nixon has assured the Special Prosecutor that the established procedures will be followed in the future as the need for additional materials arises in any future trials or investigations. In addition, subpoena power will remain available if needed.

6. The positions that the Special Prosecutor was prepared to support in this litigation will be represented by the United States, a party herein.

Under these circumstances, there is no live dispute between plaintiff and the Special Prosecutor, and the reasons which led the Special Prosecutor to intervene in this action no longer apply. Accordingly, the Special Prosecutor submits that he should be granted leave to withdraw.

Respectfully submitted,

/s/Henry S. Ruth, Jr.
Special Prosecutor

/s/Peter M. Kreindler
PETER M. KREINDLER
Counsel to the Special Prosecutor

/s/Kenneth S. Geller
KENNETH S. GELLER
Assistant Special Prosecutor

Watergate Special Prosecution Force
1425 K Street, N. W.
Washington, D. C. 20005.

September 8, 1975.

[Caption Omitted in Printing]

ORDER

Upon consideration of the Motion of the Special Prosecutor for Leave to Withdraw, dated September 8, 1975, it is by the Court on this day of September, 1975, hereby

ORDERED that the aforesaid motion be, and the same hereby, is granted.

CARL McGOWAN
United States Circuit Judge

EDWARD A. TAMM
United States Circuit Judge

AUBREY E. ROBINSON, JR.
United States District Judge

[Caption Omitted in Printing]

JOINT MEMORANDUM OF INTERVENOR-DEFENDANTS IN OPPOSITION TO PLAINTIFF'S REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

* * *

APPENDIX I

DOCUMENT PRACTICES OF OTHER FORMER PRESIDENTS

In this appendix, we examine the document practices of eight Presidents of the United States: Washington, Jefferson, John Quincy Adams, Buchanan, Taft, Harding, Franklin Roosevelt, and Truman. We do not contend that all Presidents followed a consistent pattern; indeed, the eight Presidents discussed below treated their papers in differing manners. We do submit, however, that this analysis makes it clear that there is no "unbroken tradition" which would justify plaintiff's extravagant claims.

a. *George Washington.* Washington took a number of papers with him when he left office. However, almost to the document, the materials Washington retained would be regarded as personal, as distinguished from official, in nature. Thus, Washington took with him letters to friends, commendations, and the like. He left behind, lodged with the appropriate department of the executive, his official papers. In fact, even before he became

President, Washington clearly articulated his view that official papers were not to be regarded as private or personal property. During the Revolution while Commander-in-Chief, Washington wrote that:

> "It appears to me impracticable for the best Historiographer living, to write a full and correct history of the present revolution who has not free access to the Archives of Congress, those of Individual States, the Papers of the Commander-in-Chief, the Commanding Officers of separate departments. Mine, while the War continues, *I consider as a species of Public property, sacred in my hands;* and of little Service to any Historian who has not that general information which is only to be derived with exactitude from the sources I have mentioned. *When Congress then shall open their registers, and say it is proper for the Servants of the public to do so, it will give me much pleasure to afford all the Aid to your labors and laudable undertaking which my Papers can give. . . .*" 25 *The Writings of George Washington* 288 (1938) (emphasis added).

B. *Thomas Jefferson.* Jefferson made no similar statement as to his policy with respect to retention of papers generated while he was in office. However, according to Professor Julian P. Boyd of Princeton University who has worked for many years with the Jefferson papers, and who is also on the Board of Directors of the Truman Library,* Jefferson was throughout his life concerned with the proper retention of documentary material he produced. Thus, President Jefferson's policy was that originals of all official papers recieved, or generated, by him were to be turned over to the relevant government department for preservation. Such official material included letters relating to the

---

**Who's Who in America* 339 (1974). Professor Boyd is also President of the American Philosophical Society. *Id.*

performance of his official duties, applications for employment with the government, and the like. Upon leaving office, Jefferson took with him only his private papers, including personal letters and commendations, which amounted to a small percentage of the documents he believed to be public in nature. Jefferson followed this policy not only as President, but previously as Secretary of State and did not distinguish between the documents he believed should remain as official ones in the course of his presidential duties and those he thought should be treated as official documents in the course of his duties as Secretary of State. *Boyd Aff.* at 2. Jefferson was, however, particularly scrupulous in separating his public from his personal documents:

> "During his two terms as President, Jefferson was extremely meticulous in depositing in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of public business or being in any sense official in nature. *As a result, the vast bulk of records of an official nature generated during Jefferson's presidency are still to be found in the various departmental record groups in the National Archives.* Many of these could be regarded as personal papers and, under some other presidents, probably would have been. Being profoundly convinced that, as he put it late in life, 'it is the duty of every good citizen to use all the opportunities which occur to him for preserving documents relating to the history of our country,' *Jefferson unquestionably employed every opportunity offered by the presidency to see to it that the public records of the office remain in public custody.*
>
> "While no exact statistical tabulation can be made of the relative amounts of personal papers that Jefferson took with him on leaving office and those of a public nature that he left in the departmental offices, my estimate of the ratio of the size of the two categories would be about in the order of one to fifty. This is a conservative estimate. It should be noted that, for his own convenience and protection, Jefferson retained *copies* of a good many official records, especially his notes and rough drafts of messages to Congress, proclamations, communications with departmental heads, and so on. But in all cases, so far as I know, the *originals* of these official documents are to be found among our public records as left there by him." *Boyd Aff.* at 2-3 (emphasis added).

Indeed, when Congress appropriated $20,000 in 1948 for the purchase of the private papers Jefferson had taken with him,

> "fully half of the collection . . . was returned . . . as being too personal a nature for government acquisition." H. Relyea, *The Management of Presidential Papers: A Brief Overview,* App. I, p. 2 (Library of Congress, September 27, 1974) (hereinafter cited as "*Presidential Papers*").

c. *John Quincy Adams.* John Quincy Adams is often cited as a President who asserted a personal right to the disposition of presidential documents because he took a substantial amount of material with him when he left the White House. However, Adams was a prolific writer—he wrote some 6,300 letters and 15,000 diary pages—and most of the material taken consisted of these letters and diary pages. *Presidential Papers,* App. I, p. 3. *It thus appears that Adams actually followed Washington and Jefferson's example by leaving behind his official papers.* In fact, prior to becoming President, Adams had adopted the position that governmental officials' right to custody of private or public papers must be responsive to the governmental need for access. During the War of 1812 when Adams headed the American delegation seeking to

negotiate a peace treaty with Great Britain, he maintained that whoever had custody of the documents involved would be "subject to the orders of our Government" and should "take charge of them accordingly." 3 *Memoirs of John Quincy Adams* 130 (1874). Adams was also of the opinion that the constitutional prerogative of refusing to make public governmental papers "pertains to the office and not to the man." H. G. Jones, *The Records of a Nation* 162 (1969).

d. *James Buchanan.* Buchanan also distinguished between his personal papers, which he took with him when he departed the office and his official papers, which he left behind. According to Professor Elbert B. Smith, Buchanan's biographer, the great majority of the documents generated by the Executive Office during Buchanan's term were left behind, lodged with the appropriate agencies of government. Int. Def. Ev. Sub., Smith Letter.

e. *William Howard Taft.* President Taft is often cited as a "classic" example of a President who took the Executive Office papers with him when he left office. President Taft's actions, however, do not coincide with that view. Rather, Taft was particularly concerned with "the proper management and preservation of the [presidential papers as the] evidentiary sources of the Nation's life." 1 *Index to the William Howard Taft Papers* vi (1972) (hereinafter cited as "1 *Index*"). Indeed, Taft had since 1912 supported the idea of a national archives to house records of the Federal Government, including those of the President, but no such storehouse was available during his term. 1 *Index* v-vi. *Taft himself made it clear that the primary reason he took his papers with him was that at the time the federal Government had provided no place to store them.* Shortly after he left office, he wrote to the White House Executive Clerk stating:

> "I do not think that I ought to burden the White House with these things and, therefore, want them sent to me." 1 *Index* v.

Moreover, Taft destroyed none of his documents, and Taft's family returned the documents to the Library of Congress beginning in 1919. 1 *Index* vi-vii.

f. *Warren Harding.* The unfortunate events surrounding the destruction of the majority of the papers of the Harding Presidency demonstrate the danger of a policy of exclusive ownership, particularly where an administration has been tainted by scandals which provide an incentive for the destruction of materials personally embarrassing to the former President or other individuals involved, yet which would be of great significance to a nation working for reform:

> "Mrs. Harding, had reserved the examination and removal of the Private Office material for herself. With the aid of her own secretary, Laura Harlan, and the late president's military aide, Major Ora M. Baldinger, she labored at this task from August 11 to August 17. *Her objective seems to have been the destruction of any material which might have proven harmful to the memory of her husband. According to Major Baldinger, she burned some of the papers there. The rest were packed and shipped to Marion in wooden crates . . . .*
>
> "Major Baldinger, who was granted an extended leave of absence from the Army to assist Mrs. Harding in Ohio, later recalled that the next six weeks were spent working in the offices of the Marion *Star,* where the papers shipped from Washington had been transferred. *With Mrs. Harding alternately designating individual items or entire folders for destruction, the total number of wooden crates was reduced to two.* In the process, any semblance of numerical order was completely obliterated.

> "The amount of files destroyed by Mrs. Harding cannot be accurately ascertained; though gaps in the file numbers of the private office papers do indicate that she may have burned as much or more than half the material available to her."

Lentz, *The Warren G. Harding Papers* (1970), Ex. DD at 3 & n.3 (emphasis added).

g. *Franklin D. Roosevelt.* President Roosevelt exhibited particular concern that his papers be preserved intact so that the Federal Government and the public would have access to them. Thus, President Roosevelt left all his papers—presidential and nonpresidential, public and private—in a single archive controlled by the Federal Government. *See* H. G. Jones, *The Records of a Nations, 144-51 (1969). Roosevelt recognized the advisability of such an action and also recognized that his presidential papers were public in nature:*

> "I have been taking the advice of many historians and others. Their advice is that material of that kind [*i.e.*, Roosevelt's papers] ought not to be broken up, for the future. It ought to be kept intact. It ought not to be sold at auction; it ought not to be scattered among descendents. It should be kept in one place and kept in its original form because, *Presidential papers and other public papers* have been culled over during the lifetime of the owner, and the owner has thrown out a good deal of material which he personally did not consider of any importance which, however, from the point of view of factual history, may have been of the utmost importance." 7 *The Public Papers and Addresses of Franklin D. Roosevelt* 630 (1941).

h. *Harry S. Truman.* President Truman took advantage of the Presidential Libraries Act to arrange for Executive Office papers generated during his administration to be stored at the Truman Library in Independence, Missouri. *Truman himself was very clear that papers*

generated by the White House were the property of the Government and should so remain:

> "President [Truman] feels strongly about . . . [officials who attempt to take government papers with them upon termination of their official status]; he has for a long time. The public papers of any top official from the President down, should remain the property of the Government, he holds." *Christian Science Monitor,* January 29, 1947, p. 7.

* * *

The foregoing descriptions are not intended to be exhaustive. We believe, however, that they make it clear that plaintiff's assertions that every President has regarded *all* papers and historical materials accumulated in the White House as his own *exclusive* personal property are simply incorrect.

[Caption Omitted in Printing]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard Nixon, the plaintiff above-named, hereby appeals to the Supreme Court of the United States from the final order entered in this action on January 7, 1976 denying plaintiff's request for a preliminary and permanent injunction and dismission the complaint.

This appeal is taken pursuant to 28 U.S.C. §1251.

/s/Herbert J. Miller, Jr.
HERBERT J. MILLER, JR.

/s/Raymond G. Larroca
RAYMOND G. LARROCA

/s/William H. Jeffress, Jr.
WILLIAM H. JEFFRESS, JR.

/s/R. Stan Mortenson
R. STAN MORTENSON
DATED: March 4, 1976 MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
Counsel for Plaintiff

[Caption Omitted in Printing]

MOTION TO AMEND THIS COURT'S ORDER OF JANUARY 7, 1976.

Defendants United States and the Administrator of General Services,, by their undersigned attorneys, respectfully move the Court for a modification of the Order of this Court dated January 7, 1976, to permit the transfer of the Presidential Materials of the Nixon Administration to the Washington National Records Center in Suitland, Maryland and to take other preservation measures, described in the attached affidavit. Such actions are necessary to prevent the deterioration of the tapes and documents. In support of this Motion, the Court is respectfully referred to the Affidavit of James B. Rhoads, attached hereto, and the Points and Authorities in Support of Defendants' Motion to Amend this Court's Order of January 7, 1976, filed herewith.

Respectfully submitted,

REX E. LEE
Assistant Attorney General

IRWIN GOLDBLOOM

DAVID J. ANDERSON

JOHN T. BOESE
Attorneys
Department of Justice
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 739-3385
Attorneys for Defendants

[Caption Omitted in Printing]

DISTRICT OF COLUMBIA)
ss.:
CITY OF WASHINGTON)

I, JAMES B. RHOADS, Archivist of the United States, National Archives and Records Services Administration, being duly sworn, in support of defendants' Motion to Amend this Court's Order of January 7, 1976, hereby say and depose as follows:

1. As Archivist of the United States, I am the administrative head of the National Archives and Records Service (NARS), a part of the General Services Administration (GSA). I joined NARS in 1952, and began working in what is now titled the Office of the National Archives, that segment of NARS responsible for the preservation and public availability of the permanently valuable records of the Federal Government. I served in the Motion Pictures and Sound Recordings Section, the Cartographic Records Branch, the Exhibits and Publications Branch, and the Diplomatic, Legal and Fiscal Branch. In 1964, I was transferred to the Office of Presidential Libraries, that segment of NARS responsible for the administration of NARS' Presidential library system. There I was involved with identifying and having microfilmed for the Kennedy Library official records pertaining to the important issues, policies, and programs of the Kennedy Administration. In 1965, I was promoted to Assistant Archivist for Civil Archives and in 1966, to Deputy Archivist of the United States. I was appointed to my present position in May of 1968. I am a member of several professional organizations and, in addition to my Bachelors and Masters degrees, I was awarded a Ph.D. degree in history by the American University, Washington, D. C., in 1965.

2. During the months of August and September 1974, the historical materials of the Nixon Administration were collected from various staff offices and filing locations in the White House and Executive Office Building, assembled in various rooms in the Old Executive Office Building, and there readied for shipment out of the White House complex. Other portions of the Nixon historical materials that had been stored in the National Archives Building were also prepared for shipment. Before that shipment was undertaken a restraining order was issued by this Court, which restraint continues to be operative, protecting the materials from unauthorized disclosure and specifically preventing their transfer. Consequently, the materials have remained for 1 1/2 years in a condition intended to be of only short duration, i.e., packed for shipment.

3. It is my considered professional opinion that the presistence of this condition increasingly threatens the physical preservation of these historical materials. The weight of boxes strapped on pallets crushes the boxes on the bottom; the atmosphere in the various rooms is not well controlled as to temperature and humidity; and tape recordings that have not been rewound in so long a period of time are in danger of deterioration.

4. In order to alleviate these conditions, the National Archives and Records Service has developed a plan to maintain custody of the bulk of this material at its records storage facility in Suitland, Maryland, just outside of Washington, D.C. This plan anticipates the transfer of most of the Nixon Presidential materials to a single, secure, atmospherically controlled storage area in the Washington National Records Center. The plan takes into account the fact that some materials may be retained at their present location pending completion of ongoing or prospective authorized accesses which would be adversely

affected by the transfer of these materials at this time. The plan includes provisions for taking such measures as are feasible to aid in the preservation of materials which temporarily remain at their present location.

5. In conducting the physical transfer, materials that are not in boxes must be packed and, as necessary, strapped on pallets. All pallets will be checked and secured. Pallets will be moved from the storage rooms and onto vehicles supplied by the Department of Defense for transport to Suitland. At all times during transmit, maximum security in accordance with existing court orders and national security regulations will be maintained. On arrival at Suitland, archivists of the National Archives and Records Service will direct the placement of material on shelves and record the location on a register.

6. To provide suitable storage space in the records center at Suitland under conditions of guaranteed security, a portion of security classified vault #2 will be converted to an exclusive storage area for the Nixon Materials. The proposed Nixon materials storage area will be separated from the remainder of the vault #2 by a floor-to-ceiling wall of expanded metal. Access to the Nixon materials storage area will be controlled by a maximum security vault door. Inside this area is an office of approximately 500 square feet. The entranceway and office area will be separated from the shelved storage area by an inside grill fence and gate. Thus authorized reference service or project activity can be conducted within the office area while access to the materials can be specifically controlled and documented. (See Appendix A for procedures covering special access to the materials.) The material will be removed from pallets and stored on metal shelving. The total storage capacity of the vault to contain the Nixon material is 23,000 cubic feet. Should all of the Nixon materials eventually be shipped to

Suitland, I estimate they will require 20,500 cubic feet of storage space.

7. The vault area designated for the Nixon materials in the Washington National Records Center is temperature and humity controlled and equipped with a sprinkler system; we are installing a smoke and fire detection system. Preservation of paper materials will be advanced by removing the material from pallets and shelving the boxes to prevent further crushing. Badly crushed boxes will be replaced. The still photograph collection, presently boxed and strapped on pallets in the National Archives, is in critical need of inspection to determine the condition of negatives and unique positive prints. Such inspection may indicate further preservation steps to be taken on the photographs, such as storing them in protective sleeves and placing these in cabinets. The tape recordings will be reqound regularly (at least annually) and visually spot checked to determine the degree of deterioration present.

8. In my opinion, the steps set forth in paragraph 7 represent the minimum actions which should be taken at the present time to insure the physical integrity of the Nixon Presidential historical materials at issue in this litigation.

/s/James B. Rhoadds
JAMES B. RHOADS

Subscribed and sworn to before me at Eighth and Pennsylvania Avenue, N.W., Washington, D.C., on this 19th day of March, 1976.

Francis J. Heppner
(Notary Public)
My Commission expires: August 31, 1979

[Caption Omitted in Printing]

ORDER

This matter having come before the Court on the Administrator's Motion to Amend this Court's Order of January 7, 1976, and the Court being fully advised in the premises and it appearing that the transfer of such materials, and other actions designed to protect their physical integrity, will in no way alter the custody of such materials by the Administrator or remove them from the jurisdiction of this Court, and it further appearing that such materials will continue to be accessible to authorized individuals as provided in this Court's Order, it is by this Court, this 15th day of April, 1976,

ORDERED that the Administrator is permitted to move all Nixon Administration Presidential Historical Materials to the Washington National Records Center, Suitland, Maryland, and to perform such acts, described in the Affidavit of James B. Rhoads, attached to the aforesaid Motion, as are necessary to protect their physical integrity.

/s/Carl McGowan
UNITED STATES CIRCUIT JUDGE

/s/Edward A. Tamm
UNITED STATES CIRCUIT JUDGE

Aubrey E. Robinson, Jr.
UNITED STATES DISTRICT JUDGE

DATE: April 15, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, Individually and as the former President of the United States,

Plaintiff,

vs.

Administrator of General Services, et al.,

Defendants

No. 74-1852
Deposition of
RICHARD M. NIXON
VOLUME I

Deposition of Richard M. Nixon, plaintiff herein, called by Defendants in Intervention pursuant to Notice of Taking Deposition, on Friday, July 25, 1975, at San Clemente, California, before Joseph F. Weitzen, a notary public.

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EXHIBITS

DEFENDANTS' IN INTERVENTION EXHIBITS

A – A one-page document consisting of a memorandum for H.R. Haldeman from Gordon Strachan dated May 11, 1971, subject Timmons' Investigation of San Diego as 1972 Convention Site. 82

B – A document consisting of 124 pages listing names and contributions 84

C – A six-page document consisting of a memorandum dated April 23, 1969 from Richard G. Kleindienst, Deputy Attorney General, to John Ehrlichman, Counsel to the President, Re: ITT-Canteen Merger 86

D – A ten-page document consisting of a memorandum for Bud Krogh from John Dean dated July 20, 1971 with attachments 87

E – A four-page document consisting of a memorandum from George Bell dated June 24, 1971, for John Dean, Jerry Warren and Van Shumway, entitled, Subject: Opponents List 90

F – A three-page document consisting of a transcript of September 15, 1972 meeting 92

G – A three-page document titled, "Donation of Personal Papers to the Richard Nixon Library," dated November 1972 157

[1]

BE IT REMEMBERED THAT, pursuant to Notice of Taking Deposition, the deposition of Richard M. Nixon, plaintiff herein, was taken by Defendants in Intervention, before me, Joseph F. Weitzen, a notary public in and for the State of California, duly commissioned, qualified and acting, beginning at the hour of 9:00 a.m. on Friday, July 25, 1975, at the Coast Guard Station, in the City of San Clemente, County of Orange, State of California; Miller, Cassidy, Larroca and Lewin, by Herbert J. Miller, Jr., and R. Stan Mortenson, appearing on behalf of the plaintiff; William Dobrovir, Andra N. Oakes, Andrew S. Krulwich, Mark J. Spooner and Leonard B. Simon, appearing on behalf of Intervening Defendants; Irwin Goldbloom and David J. Anderson, of the U.S. Department of Justice, appearing on behalf of Defendant United States of America and Administrator of General Services; Kenneth S. Geller, Assistant Special Prosecutor, Watergate Special Prosecution Force, [2] appearing on behalf of Special Prosecutor, Intervenor; there being no other appearance; that said witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the testimony he was about to give; whereupon said witness was examined upon oral interrogatories propounded by counsel, and made answer thereto, under oath, as hereinafter contained; and the following proceedings were had:

THE NOTARY: This is now the time and place for the taking of the deposition of Richard M. Nixon, plaintiff

herein, called by Defendants in Intervention pursuant to Notice of Taking Deposition.

[3] RICHARD M. NIXON,

plaintiff herein, called by Defendants in Intervention, pursuant to Notice of Taking Deposition, and being first duly sworn, testifies as follows:

EXAMINATION BY MR. DOBROVIR:

Q. Good morning, Mr. Nixon.

You were President of the United States of America from January 20, 1969, to August 9, 1974? A. Yes.

Q. And what other public offices have you held? A. Congressman for four years; Senator for two years; Vice President for eight years; Deputy City Attorney, Whittier, California, for three years.

Q. And you are an attorney? A. No, I was. I resigned as a member of the Bar.

Q. You practiced as an attorney in the past; is that correct? A. I have practiced law in the past.

Q. As President of the United States, did you have familiarity with the various components of the Executive Office of the President? A. Yes.

Q. Do you include in the materials which you claim in this lawsuit all of the documents created by the Executive Office of the President during your tenure in office? A. I think it is necessary for the record to distinguish between the Executive Office of the President and Office of the [4] President.

With the Executive Office of the President, I am talking about a very broad spectrum of the office. For example, the Office of Management and Budget, the Council of Economic Advisors, and other institutions which are called or designated as being part of the Executive Office of the President, whereas the Office of the President itself is more limited than than.

The Office of the President is limited to those, and I refer now to the materials that we use in our Complaint. The materials for the Office of the President are only those that are generated throughout the government but which are sent to the President for his use in carrying out his official or other duties.

Q. When you refer to the Office of the President, are you referring to what is called the White House Office in the Official Organization Manual of the United States Government? The White House Office is the term used in the Organization Manual.

MR. MORTENSON: Excuse me, Counsel. Do you have a copy of the Manual so we can check that?

MR. DOBROVIR: I am afraid I didn't bring it with me.

THE WITNESS: I am not familiar with that term. I am sorry. I know what I consider the Office of the President to be, but I am not familiar with what the White House Office would be. I can describe it only in terms of its physical location and rooms that were used.

[5] BY MR. DOBROVIR:

Q. Let me run through a list of components and see which of those you consider to be part of the Office of the President, for purpose of our claim for materials in this case.

The Office of Economic Opportunity?

A. Go ahead.

Q. I am asking you, do you claim, as part of this case, the materials of the Office of Economic Opportunity? A. No, only if materials were prepared by the Office of Economic Opportunity for the President.

And so as to make your task easier, all of the other, and there are great numbers of offices of this type, the other offices, commissions, et cetera, et cetera, et cetera, which were set up, some of them were an independent

role, some were quasi-independent role, but all of them at one time or another may have had the opportunity to assist the President in the carrying out of his duties.

What I consider to be the Office of the President involves only those materials that are prepared by, as far as government materials are concerned, that are prepared by whatever office it is, the Office of Economic Opportunity or the Council of Economic Advisors or the Environmental Products Agency. I think I have got your list. You don't need to show it to me.

Q. Let me ask them one by one and if you could, just say "Yes" or "No," it would be helpful, as to whether or not you include within the materials claimed in this lawsuit the files of that component.

[6] The President's Advisory Council on Executive Organization? A. Only if the materials were prepared for the President.

Q. All right. The National Council—

MR. MORTENSON: Counsel, could I interrupt and make sure the witness understands. We are talking now about the files maintained by these respective agencies and not the materials sent by them to the President?

MR. DOBROVIR: Correct.

THE WITNESS: I made the distinction in my answer.

MR. DOBROVIR: I think the witness understands.

BY MR. DOBROVIR:

Q. The National Council on Marine Resources and Engineering Development? A. The same answer.

Q. The National Commission on Productivity? A. The same answer.

Q. The Office of Intergovernment Relations? A. The same answer.

Q. The Office of Consumer Affairs? A. The same answer.

Q. The Special Representative for Trade Negotiations? A. The same answer.

Q. The Special Action Office for Drug Abuse Prevention? A. The same.

Q. The Office of Telecommunications Policy? (At this time the plaintiff and plaintiff's counsel [7] confer.)

THE WITNESS: The same answer.

BY MR. DOBROVIR:

Q. The Office of Science and Technology? A. Let me explain. Where we are talking in each instance, talking about Federal agencies, Federal offices, the Office of Science and Technology, I think—

Q. I was talking before of the Office of Science and Technology. That was a component of the Executive Office of the President? A. The same answer.

Q. The Office of Management and Budget? A. The same.

Q. The Office of Emergency Preparedness? A. The same answer.

Q. And the National Security Council? A. The same answer.

Q. The National Aeronautics and Space Council? A. The same answer.

Q. The Domestic Council? A. Yes.

Q. The same answer? A. Yes.

Q. The Council on International Economic Policy? A. The same answer.

Q. The Council on Environmental Quality? A. Yes.

[8] Q. The Council of Economic Advisors? A. The same.

Q. Special Assistants to the President? A. Excuse me?

Q. The Special Assistants to the President.

The budget shows that in fiscal year 1972 there were thirty-six individuals who had the title and filled positions entitled Special Assistants to the President. My question is: Are the files accumulated by those thirty-six individuals included within the materials that you claim in this lawsuit?

A. Well, there would be a distinction there to the extent that such special assistants who had prepared materials in their own behalf, which they could do, and were not preparing materials for or at the direction of or for the use of the President, I would not consider those materials to be presidential materials.

As a matter of fact, some of those that were assistants to the President and those that have since left government take materials with them, those materials they consider to be their own.

Then on the other hand, materials prepared in their capacity for the use of the President in carrying out his official duties or other duties, I would consider to be presidential materials.

Q. A memorandum received by, let's say, Mr. Ehrlichman, from, let's say, the Attorney General of the United States dealing with antitrust policy stating this is what – this is a [9] hypothetical question – stating this is what we are planning to do with respect to development of antitrust policy, is that the kind of document that you include within the materials that you claim in this lawsuit? A. Well, in the case of – I cannot speak for all administrations, I can only speak for my own.

Q. That is all I am asking now. A. In the case of a memorandum prepared by the Attorney General for Mr. Ehrlichman, in effect he would be, in effect, preparing a memorandum review for Mr. Ehrlichman and for transmittal for review by me. I would consider a memorandum of that sort to be one of presidential material.

Q. Even though it was directed to Mr. Ehrlichman and nothing shown on its face and nothing on it that it was intended for your eyes? A. Yes. I say that because Mr. Ehrlichman, and this would be true of others, presidential assistants, not only in this administration but others, would have no power of decision to act on such a memorandum on an antitrust matter. That power of decision

would be mine as President or whoever happens to hold that office at this time or in the future.

Q. Now, in addition to the offices which I have named, which by no means do I intend to be or know whether it is a complete list or not, were there not during your administration a large number of ad hoc committees and commissions and task forces that reported to the President? A. Yes. Too many.

Q. Does the number two hundred fifty sound right? [10] A. Yes. It could have been five hundred.

Q. It could have been five hundred.

Now, do you include within the materials that you claim in this lawsuit the files of those committees, commissions and task forces? A. Only to the extent that the materials were prepared for me for the purpose of making a report to me, not materials that were prepared independently in terms of developing options for the committee and so forth and so on.

Q. If the sole function of the committee or task force was to prepare a report for you, would you consider that all of the files that they accumulated in the course of that work are included in your presidential materials? A. If I had appointed a task force, talking now about one other than like the Council of Economic Advisors, et cetera, which, of course, we inherit from previous administrations and presidents and customs, but if I had appointed a task force to make a particular study for me, then I would consider those files to be part of the presidential materials.

For example, if I appointed a task force, as I did on Population Control, and this was considered, and I should point out a task force which was appointed not because congressional action required it but because I, within my own office, decided that one should be appointed in order to carry out my official duties more effectively, then of course such materials prepared by that task force,

prepared for me alone as President, I would consider to be presidential materials.

Q. How about the files of the 1969 and 1973 [11] inaugural committees? A. The files of committees of that type I think throughout history have been considered, perhaps even more than any other files, as being particularly the materials which are the President's materials, because they have to do with his inauguration and they therefore are part of the materials that are made available to him.

Q. Now, turning to what you described as the Office of the President. Approximately how many employees did that office have during your tenure as President? A. I wouldn't know.

Q. Does the figure five hundred sound about right? A. It might be.

Q. Now, how many of the employees of the Office of the President had regular access to you for purposes of performance of their and your official duties? A. I can't give you a number. I would say any of those who needed to have access had it.

Q. Now, as President, can you estimate how much of your time was spent in preparing yourself written documents? A. I cannot estimate it in terms of a percentage of time. I can, perhaps, estimate it in terms of comparison with previous Presidents in this century.

When the presidency, as you know, became a much more burdensome office, in terms of various duties to be carried out, as you know there was a time in our history when presidential speeches might be better because Presidents like Lincoln wrote their own, Jefferson and so forth. In this [12] century, I would say I have spent more of my time preparing my own speeches and other public statements than any President since Woodrow Wilson. I would say he probably spent, in this century, more time than any other President for that purpose,

with the possible exception of Theodore Roosevelt. But I would suggest here again that it depends on the individual. It depends on what other duties he has.

When the country was younger, when the country didn't have the responsibilities that it has in the world today, when the government was much smaller, the President had the luxury of preparing speeches and materials and did so. I had always had the custom, before I became President, of doing virtually all of my own work. I carried on as much as I could on any important speeches; I did most of the preparation myself with very good assistance from staff suggestions. But when it came to the final drafts I had to do them myself.

I realize that I am not answering your question specifically. But I cannot at this time say I spent five percent of my time or a third of my time preparing speeches. I do say, however, that I spent a very great proportion of my time, more than any President in modern history, doing my own work, because it had been my custom. And I don't say that critically of previous Presidents, because it is very likely those who wrote speeches for them may have written better speeches than they would have for themselves.

Q. There were great demands on your time; isn't that so? A. Pardon?

[13] Q. There were great demands on your time? A. That is true, great demands on a President's time in this period when the United States has reached the status of a full-fledged world power, particularly when other powers that used to be in that category, for example the European powers, no longer can carry their share of the load.

Q. Were you required to spend as much as half of your time in meetings with other people or would it be more than half? A. I can't give you an exact amount.

Q. Would you say that a large portion of your time was spent in meetings? A. Oh, yes. Yes.

Q. More time than was spent in reviewing written documents or less? A. Oh, more. More.

Q. More? A. Yes.

Q. And more time than was spent in preparing your speeches and statements? A. Yes, although it depends on the period in which I was working. One month more would be spent in speeches and statements and another month more would be spent at meetings with people and so forth and so on.

Q. All right. In addition to meetings and telephone conversations with other individuals and reviewing written documents that were transmitted to you and preparing written statements or statements for delivering by you, in addition [14] to those three things what other things did you spend your time on, and I am talking only, of course, about in performance of your official duties? A. I traveled some.

Q. Anything else? A. You refer to other than meetings and preparing the speeches? I made the speeches.

Q. You delivered the speeches? A. That is right. And I, of course, had the usual protocol responsibilities that falls upon a President, all of which are, of course, a matter of public record.

Q. Right. Are you familiar with the Complaint in the action, sir, Mr. Nixon? A. Oh, yes.

Q. Now, are you aware that your claim encompasses what is estimated to be in the neighborhood of 42 million documents? A. Yes.

Q. Can you estimate what portion of those 42 million documents you have actually seen yourself? A. No. I am a relatively fast reader. I don't mean that I have taken a reading course, but I generally can look at a document and tell what needs to be read. I have never been one of those who insisted it almost all be on one page, because I wanted the full range of options and to see the kind of reasoning that the advisor had gone through in the reasoning process in order to reach conclusions.

I would say, without telling you how many of the 42 million I have read, only a review of the file and indication [15] by checkmarks on them could tell you that. And here again it is the difference between Presidents. Some tend to prefer to spend more of their time in public meetings and private meetings, as what I call doing things, and I prefer to spend a higher degree of my time, to the extent possible, in thinking about problems. So consequently, in the many days that I spent at Camp David, in Florida, and on occasion even here in San Clemente, I read enormous amounts of material in addition to the day-to-day flow of materials that came across the desk. And that is one of the reasons that the number of documents is so enormous.

As you know, the number of ducuments in the Johnson Administration was approximately 32 million for the same period of time. This is 42 million. That doesn't mean that our administration was better than his, I am not contending that. It only means that it was my instructions to my own staff and others to give me the broadest range of options before I made an important decision and also because of their awareness of the fact and some of them were surprised when they came in the office and found that I had read what they had put in. Their awareness of the fact that I was one who had the habit of learning more from reading, because you can read about three times as fast as you can listen than just from what we call a bull session.

Q. Would the number of documents that you, yourself saw be as many as one hundred thousand? A. Oh, at least, I would say.

Q. At least. That would be approximately 50 per day [16] for the approximately two thousand days of your tenure in office? A. Right.

Q. Does that sound about right? A. Well, I couldn't hold to the figure, but I would say that I would be sur-

prised if it were less than that and I would be less surprised if it were far more than that.

Q. Two hundred thousand? A. Yes.

Q. Does that sound right? A. I can't answer that question. Obviously I haven't counted the number of documents.

Q. Two hundred thousand would be one hundred a day. A. Could well be. Could be more.

Q. Three hundred thousand? A. Let's stop at two hundred thousand.

Q. All right. Now, we discussed a moment ago the fact that there were great demands on your time as there are on the time of any other President. Did you establish procedures designed to insure that you only were presented with the documents that were essential for you to read? A. Oh, yes.

Q. What were those procedures? A. Well, the procedures were to have advisors in various areas who would screen the flow of paper work coming into the President's Office or coming in for his, at least, consideration, and then to have those documents put into what I called my reading file. Some of them, of course, required [17] reading almost immediately. If, for example, a veto message was involved, something of that sort, where there was a time limit. Some of them might require – didn't have the same urgency – decision far down the line, and I asked for that too.

So in the field of foreign affairs I would rely on Dr. Kissinger to screen the great amount of material that came in from the various agencies who had interest in foreign affairs and that included others than the State Department, as you well know, and also from various private groups and private citizens who had views which I valued. I might not always accept them.

Mr. Ehrlichman, he was head of the Domestic Council, and Mr. Moynihan would screen the documents in that

field and the political area generally Mr. Haldeman might screen the documents. And I also had ways in which individuals who felt they couldn't get through the so-called Palace Guard could get to me directly. And a number of friends, former advisors, when I was a Senator, Congressman or Vice President or out of office and so forth, would send their materials to my personal secretary, Miss Woods. And a great amount of material came through her to me.

Q. So that Dr. Kissinger was responsible for screening foreign policy documents, Mr. Moynihan and Mr. Ehrlichman were responsible for screening what we can call generally domestic materials, Mr. Haldeman was responsible for screening political materials and then Miss Woods was a channel for communications from personal friends and other associates? [18] A. But the communications would deal not only with personal matters, sometimes they would, quite often they would, and most often they would be intermixed with personal and public matters. These would be communications from individuals, as I said, who felt that they might not be heard.

Now, in addition to that I should say, however, that the documents that reached me were not limited to those individuals and the so-called screening process was not all that precise. For example, Mr. Ziegler, the Press Secretary, would bring in documents that, and he had the right to at any time, that had to do with relations with the press. Mr. Harlow and later Mr. Timmons often brought me documents directly that had to do with relations with Congress. Needless to say, if an independent agency were involved, like Dr. Arthur Burns, he always came in directly and he sent his things directly, not through anybody else, because of his justifiable concern about the independence of the Federal Reserve.

Various cabinet officers, including Secretary of State Rogers, the Secretary of the Treasury, as well as heads of

independent agencies often sent documents in directly to me. Sometimes they would send them through Miss Woods and sometimes they would come directly into the office and hand them to me. And the reason for this is that there is always a feeling in any administration that you can't break through this, what is called, Palace Guard. I felt very strongly that I wanted to be sure that I had all options in front of me.

Q. Of the documents which you saw, would you say that a large number of them or a small number of them were designated [19] either specifically or de facto as "eyes only" documents?

MR. MILLER: Counsel, could you explain to me what you mean by "large or small," in the context of your question. I don't understand it.

MR. DOBROVIR: Let me try and ask it a different way, Mr. Miller.

BY MR. DOBROVIR:

Q. Were not most of the documents which you saw seen either before you saw them or after you saw them by other members of your staff? A. Well, I thought I answered that question as far as to whether most of the documents were seen before by other members of the staff. I would say perhaps that was the case, but I would have to look at the various documents to be sure, because a great number of documents came directly to me and not through a member of the staff. Because when a document, for example, came through my personal secretary or when it was delivered to me personally, needless to say that document was not being reviewed by the personal secretary, that was not her job.

Q. Now, Mr. Nixon, in your Affidavit you use a number of terms and I would like to ask you to define them for us so we have a bench mark for the rest of this examination.

In Paragraphs 9, 10 and 12 you use the term "political." Now, could you define the term "political" as used by you in your Affidavit.

A. It is difficult to separate political from official [20] and even from private. But the term "political" as we use it or as I use it in this Affidavit, I would say would have to do with the President's responsibility as leader, first of his own political party and supporting the candidates of that party to the extent that he was able to do so. Also the President's responsibility, and here is where you get some mixture, in carrying out his official duties to discuss what would be termed rather crass political matters. For example, I was the first President, as you know, I think in perhaps one hundred years who came into office with both houses controlled by the other party. It was impossible to carry on my official duties without having a very cordial and at times cooperative arrangement with enough leaders and if not leaders people who had followers within the other party in order to get legislation through or a veto sustained.

I would say that my activities therefore in carrying out my official duties of getting approval for legislation or support on a veto, matters of that sort, that it would be necessary for me to talk what I would call politics with Democrats as well as Republicans. What I am indicating here, in effect, is when I use the term "political," I do not limit it to that being partisan Republican leader. If I had been only that none of the great initiatives which we accomplished during our administration could have come about.

Q. In other words, are you saying that it is one of the normal activities of the President in performance of his official duties to take account of political considerations and made political judgments and in effect conduct politics? [21] A. It certainly is or he isn't going to be an effective President.

That was the tragedy of Wilson in his last years. The first term was a good one. His second, apart from his illness, was unfortunate because it became too partisan, he did not recognize the necessity to work with both parties.

Q. Would you define the word "personal," which you use in Paragraphs 10, 12, 13, 14, 16, 17, and 18. A. Well, here the word "personal" can to an extent overlap, needless to say, with political, because an individual who is interested in running for office may speak to a President with regard to his personal problems, with regard to the personal problems of his opponent and vulnerabilities thereof, and would present the matter, for example, to the President in somewhat personal terms.

I recall, for example, when certain members of Congress were trying to determine whether to retire or not. That, of course, is a political decision. They would be very candid and forthcoming in talking about their reasons for, with regard to their health, regard to family problems they had and with regard to financial problems they had and so forth. The latter part I would consider personal, the other I would consider political.

But as far as personal is concerned, generally speaking I am referring here to, needless to say, my family, to close personal friends, which include people within the administration, members of both parties, people in the Congress, representatives from all segments of American society, because [22] a President over the years before he becomes President, particularly while he is President, develops close personal associations and friendships with leaders of business and labor or religious leaders, educational leaders and many others of that type.

Q. Anything else under the category of "personal"? A. I think I have given you a general idea of it but if there is anything specific I will be glad to respond.

Q. I am just asking how you would define it, sir.

Another term which you use is the term "private," in Paragraphs 11, 12, 18, and 26, and in particular in Paragraph 26 you refer to materials which you "consider to be so private and confidential that no one else should participate in the initial review."

Would you define the word "private" as you use it there?

A. Well, private is encompassed in personal. The term "personal" is the broader term. Private would be, oh, conversations and communications that I would consider to be, that any President would consider to be totally confidential. Matters involving, for example, his own family, his wife and his children, his relatives, his very close friends and intimate friends. Needless to say, a private communication would be one involving those individuals or an attorney when he makes up his will. A private communication would, needless to say, also involve any conversations he might have with his doctor, with his minister, areas of that type. But I would also categorize those as being personal as well as private. [23] I mean I am suggesting that private is somewhat narrower, it is a part of personal but narrower in terms of the individuals that would be considered in the private category.

If I could point out, so that you can understand. I might have a conversation with possibly a political leader, a member of Congress, so forth, in which personal matters were discussed. Whether that would also be considered private would depend upon the nature of those matters.

Q. So we have some documents and conversations which you have categorized as private, as you have defined it, and some that you have categorized as personal, as you have defined it, and some that you have categorized as political, as you have defined it.

Now, in addition to those three categories is everything

else in the presidential materials which is not either political, as you have defined it, personal, as you have defined it, or private, as you have defined it, material that relates to the performance of your official duties?

MR. MILLER: Mr. Dobrovir, I would object to that question. I think you would have to go to the specific area that you are talking about and not try to block out some document that might exist in the 42 million documents that might fall in a different category. The question is so hypothetical I have great difficulty in understanding how it could possibly be answered.

MR. DOBROVIR: Let me ask the witness.

[24] BY MR. DOBROVIR:

Q. In addition to the three categories, political, personal and private, a fourth category I would call specifically governmental, unquestionably dealing with governmental matters, are there any other categories into which these documents might fall? A. I can think of none.

Q. Thank you.

Now, into which of those categories would fall your conversation on June 23 with H.R. Haldeman, with respect to Mr. Gray and Mr. Walters, the FBI and the CIA and their relationship to the burglary of the Democratic National Headquarters of Watergate?

MR. MILLER: Can we have the conversation, please.

MR. DOBROVIR: Do you want to be off the record?

MR. MILLER: I don't have a copy of it before me.

MR. DOBROVIR: Oh. All right.

The conversation I am referring to, I have here Appendix III to the statement of Information Hearings Before the Committee on the Judiciary, House of Representatives, 93rd Congress, Second Session, pursuant to House Resolution 803. I am not reading the rest of the title. A transcript of a tape recording on Page 39 of that volume, and I have reference to the conversation that

begins towards the bottom of Page 40 with the words "Now, on the investigation, you know, the Democratic break-in thing," and it goes on to Page 45 at the bottom with the word "Okay."

I am handing the volume to Mr. Miller.

[25] MR. MILLER: What is the question, Mr. Dobrovir?

MR. DOBROVIR: Which of the four categories, political, personal, private or governmental, does that conversation fall in?

MR. MORTENSON: Let me interrupt, Counsel. You are using the term "governmental" and I don't think that is a term used in the plaintiff's Affidavit. I think if you are looking for the terms that he used in the Affidavit, in his definition, that the fourth category as you separate them is items related to his official duties–

THE WITNESS: Presidential duties.

MR. MORTENSON: – and not governmental duties.

MR. DOBROVIR: I will accept that amendment.

THE WITNESS: We will have the whole record show that, because I know Counsel wants the record to be accurate,–

MR. DOBROVIR: Yes, indeed. I know the witness does.

THE WITNESS: Because we don't have a tape, obviously and can only rely on what we have here.

I would categorize this as political and to an extent personal.

BY MR. DOBROVIR:

Q. And no way related to the performance of your official duties? A. This conversation?

Q. Yes.

(At this time the plaintiff and plaintiff's counsel confer.)

[26] THE WITNESS: Like all conversations, this one

is intermixed, I see. I see here, for example, Senator Church is referred to and also Congressman Mills.

MR. DOBROVIR: What page is that on, where those two gentlemen are referred to?

THE WITNESS: Page 9.

MR. MILLER: Page 47.

MR. DOBROVIR: The conversation I specified begins on Page 40 and ends on Page 45 and ends with "Okay," on Page 45.

MR. MILLER: I don't see that in our document, Mr. Dobrovir. Would you care to examine it and point it out.

MR. DOBROVIR: Did I err?

MR. MILLER: It indicates "Okay," but then there is a question. Apparently that document contains a conversation that continues on past Page 45.

MR. DOBROVIR: The document contains some twenty more pages.

MR. MILLER: Are you taking two or three pages out of a conversation and ignoring the entire conversation? Is that it?

MR. DOBROVIR: I asked about that specific portion of the conversation. If the witness wishes to discuss other portions I have no objection.

MR. MILLER: All right.

MR. DOBROVIR: But is the witness' answer that the portion between 40 and 45, which I designated, was that personal and political?

MR. MORTENSON: If Counsel's question was limited to [27] those pages, I believe that the witness answered that as being political and personal. I think for clarity of the response, to say that the entire conversation looked at contains elements of all three.

MR. DOBROVIR: I understand.

THE WITNESS: The entire conversation was one about an hour. This is about five minutes. I think that is the problem we have.

MR. DOBROVIR: All right.

THE WITNESS: And I think the reason that Mr. Miller raised this point was the "okay" was not something you had marked "okay," but something that was in the file. There is no marking here.

MR. DOBROVIR: I didn't mark the page, I just asked you to—

THE WITNESS: No problem.

MR. DOBROVIR: Thank you very much.

THE WITNESS: I am just trying to expedite the matter.

BY MR. DOBROVIR:

Q. So that we have a complete set of bench marks here, you have defined for us political, personal and private and we have a fourth category I will call governmental, and which Mr. Mortenson corrected me to read as official. I wonder—

MR. MORTENSON: Let me correct the record again. I believe what I said in the Affidavit, the plaintiff has used four terms for categorizing the materials and one of which is materials related to official actions. I don't believe [28] anywhere in the Affidavit there is a reference to official materials.

BY MR. DOBROVIR:

Q. So the term is materials related to official action; is that correct?

THE WITNESS: I would insert in there, if I might, presidential materials related to official actions. Is that correct?

MR. MORTENSON: Yes.

THE WITNESS: That is the accurate description, I think.

BY MR. DOBROVIR:

Q. Can we have a definition, Mr. Nixon, of that term "Presidential materials related to official action." A. As a matter of fact, that is what we have been discussing as to the questions that you have asked up to this point.

Q. I wonder if you could give us a definition in the same way that you have defined the other terms. A. Presidential materials related to official action?

Q. Yes. A. Well, this would cover all of the official actions of the President; those imposed upon him by the Constitution and particularly, for example, the preparation of the State of the Union message; reporting from time to time to the Congress; the recommendations to the Congress for legislation; obviously the veto of such legislation; appointments made by the President, [29] which cover, of course, his Cabinet. But I would say in constitutional terms, as I recall the Cabinet is not referred to but by precedent it has become, through one of our precedents, Madison Marbury, one of the official responsibilities and perhaps even more important where lawyers are concerned, appointments to the judiciary and in addition to all the appointments the President makes as Commander in Chief of the Armed Services.

Q. And does it include those materials that relate to your general supervision of the administration of the Executive Branch of government? A. What do you mean by "general supervision"?

Q. Well, you are the Chief Executive. As President you were the Chief Executive of the United States; isn't that right? A. Yes.

Q. And in addition to appointing the Cabinet officers, you also were responsible, under the Constitution, to take care that the laws were faithfully executed, you were responsible for overseeing what all of these persons that you appointed did and how they carried out their duties; isn't that so? A. Well, it would be dependent upon what duties are involved.

As Counsel is quite aware, the Congress has moved into these areas in some instances and it says that certain duties shall be carried out by people in the Executive Branch independent of the President.

Q. Aside from those specific matters in which Congress has done that, you do have supervisory responsibility for [30] Cabinet officers and other appointees; isn't that so? A. Yes, that is true. That is true.

Q. Very well. Now then, included in the category of the presidential materials related to official actions, do we have documents that are prepared in or by an agency or a commission or a department with respect to its own functions, of which a copy is transmitted to the White House for the White House Staff and your information? A. Well, the situation here is that whether it would be a department or an independent agency or an ad hoc commission or special commission or what have you, except for those commissions that we delineated a moment ago, that are appointed directly for the President, for the purpose of reporting directly to him, that the records of those agencies are in those agencies and belong to those agencies. That is, when those agencies have recommendations to make to the President they, of course, come to him. But they, of course, retain in the agencies and they continue through other administrations as well.

Q. So those documents which come from agencies to the Office of the President or go from the Office of the President to those agencies are not considered part of your presidential materials?

MR. MILLER: Would you repeat it.

THE WITNESS: I think I have answered that three, four times but I will do it again for the fifth time.

MR. DOBROVIR: No, once is enough.

THE WITNESS: At least four times is enough.

Now, I don't mean to haggle about it, because it is

[31] a rather novel matter that hasn't been discussed before.

The way it happens, a specific department, the Secretary of Agriculture, the Agricultural Department, has a whole mass of paper work that is prepared in the Department. Very seldom does anything come to the President that has to do with the work of that Department unless it requires Presidential action or decision.

For example, a recommendation on the Food Stamp Program legislation, extension thereof, increasing it, or when we initiated it, what kind of program should it be. That is a matter that would come to the President.

But as far as the Department papers are concerned, materials are concerned, those are in the Department. It is only when a department or an agency, an independent agency or other agency has a direct responsibility or relationship with the President in the carrying on of his official duties, that whatever is prepared then becomes not only, I would say acquires basically a dual personality, if we are going to distinguish in this instance, because needless to say each department also keeps its copy and the original comes to the President.

BY MR. DOBROVIR:

Q. So is the copy in the department considered an ordinary agency document then? A. It is not quite ordinary. No, the reason if it were ordinary it would not come to the President. If it comes to the President, it takes on a different aspect.

Q. But the copy that remains in the agency is an agency [32] document? A. The copy that remains in the agency? Oh, I would think so; yes.

Q. Subject to all of the applicable Federal statutes? A. That have to—

MR. MORTENSON: Counsel, that calls for a legal conclusion that I don't think you have established that the

witness has the background to answer that.

THE WITNESS: Counsel is well advised. If I knew I would answer.

MR. DOBROVIR: Very well.

BY MR. DOBROVIR:

Q. Now, in your Affidavit, Mr. Nixon, you have specified certain interests that you are seeking to protect with regard to the materials that are the subject matter of this lawsuit and I find the following: The interest in nondisclosure of personal matters and private matters; the interest—

MR. MILLER: Would you give me a page on that, Mr. Dobrovir.

MR. DOBROVIR: I have Paragraphs 10 and 12 through 19.

BY MR. DOBROVIR:

Q. Then we have nondisclosure of political matters, to which I have Paragraphs 9 and 10. We have confidentiality of – let me get the right word – matters related to official actions and for that I have Paragraphs 7, 8 and 20; and I have [33] interest in preparation by you of your memoirs, for which I have Paragraphs 22 and 23; and the last one I have is the creation of a presidential library and the preservation of these materials for the use of scholars, for which I have Paragraphs 23, 24, 26 and 30.

Now, is there any other interest that is not listed in your Affidavit, which you are seeking to protect with regard to the materials.

MR. MILLER: Do I understand the question to mean is there any other interest other than what you have characterized the Affidavit as covering or the Affidavit itself, besides from your characterizations?

BY MR. DOBROVIR:

Q. Why don't we say any interest, other than those which I have specified, which is based on any interpretation of your Affidavit. A. No. I would say that I would stand on the Affidavit. It would be, of course, bad to answer questions with regard to your interpretation.

Q. Well, I don't want to be repetitious. But are you seeking to protect any interest in regard to the materials, in addition to the following five interests: First, the interest in nondisclosure of personal and private matters; second, the interest in nondisclosure of political matters; third, the interest in the confidentiality in matters relating to official action; fourth, interest in preparation of your memoirs; and fifth, the interest in the relation of a presidential library [34] and preservation of materials for scholars? A. Yes. Far more than that.

Q. Would you please give them to us. A. I would suggest counsel refresh his memory by reading the pleadings. The pleadings set forth other grounds, of course, and the Affidavit addresses itself only to certain specifics. But I would not want the record to show that the case, from the factual standpoint, is based solely on the affidavit.

Q. Can you tell me what other interests you are seeking to protect in addition to those five which I have listed? A. Do you have the Complaint, Counsel?

While they are searching for it, because you probably read it,—

Q. I am familiar with it. A. I would suggest having read the Complaint, that from Page 16 through Page 18 we list the reasons for the invalidity of the act and that, of course, the Complaint itself goes beyond that. But this is a summary of the reasons for the invalidity of the Act and are broader than the Affidavit. That is the only point I am making.

Q. I would like you to tell me what those additional interests are, please.

(At this time plaintiff and plaintiff's counsel confer.)

THE WITNESS: Well, this is perhaps covered better in the pleadings than I will cover it orally.

To me this suit involves, as the last paragraph of the Affidavit indicates quite clearly, not simply my interest [35] alone, the ownership question as far as presidential materials are concerned. My primary interest is the institution of the presidency itself and of the ability not only of a President but of any official elected or appointed at the Federal or State level to carry out his official duties.

In my view, from my experience, the carrying out of official duties involves, and this is more true of the President than anybody else but it affects members of the Judiciary, it affects Cabinet Officers, it affects members of Congress, Governors and State Legislators and even people down the line at the City and County level.

As far as public office is concerned, and particularly where the Presidency is concerned, the most important consideration is that he make the best decisions possible. Now, different Presidents have approached this problem of how to make the best decisions in different ways. I was influenced to an extent, I must say, not only by my rather extended experiences with President Eisenhower, when for eight years I saw how he made decisions, but by a conversation that I had just before I became President, just before my inauguration, with Dr. Arthur Burns, who had served in the Eisenhower Administration and in a consultative capacity for the administrations thereafter and who, before I appointed him as Chairman of the Fed, was my chief advisor in the domestic area. And Dr. Burns said that the problem with most Presidents and, of course, most officeholders, particularly Presidents, is that everyone who comes to see him, be he a staff member, Cabinet member, Congressman, Senator, business or labor representative or [36] what have you, tries first to find

out what the President wants or thinks and then does his best to present a case on all fours with what the President is thinking or wanting.

He said the most important prerequisite for good decision making is for a President to have before him all possible options, a wide range of options. And he said in order to get that kind of advice, first he said you must tell your Cabinet that, which I did at our first meeting. Second, you must tell your staff that, which I did very early in our administration, telling them in effect that I was interested in their views, that I could not always assure them their views would be accepted but that I wanted them to present their views with all the bark off so that I could, in making up my own mind, have the full range of options in front of me.

I also did this in my relationships with people outside of government, they were quite aware of this, which had frankly been my practice long before I became President and one which I implemented in many instances quite successfully when I was President. People outside of government were willing to write in what they might consider to be unpopular views, even views which in the light of history might prove to be stupid but they would do so usually only if they felt they were not going to be held accountable therefore in the public forum. They did so and I got advice of that type, because individuals knew I could keep a confidence and, of course, I felt that they could as well.

In my view this principle of confidentiality, which I realize is not in vogue these days in many quarters, is [37] indispensable for making great decisions. There would have been no opening to China without total absolute secrecy and confidentiality. Not because anything wrong was involved but because any leak would have destroyed the fragile framework that we had built up

over a period of years starting from the time I ventured that opinion, before I became President, in an article to Foreign Affairs.

There was a situation, there would have been also in the domestic field very great difficulty in implementing the program that we had for desegregation of schools in the south unless it had been done with some degree of confidentiality and the assurance so that a President could have candid, very frank discussions with people on both sides with regard to the problem and by gaining their confidence then be able to make decisions which would enable him to move forward on an issue.

There also comes to mind the new economic policy, which was announced on August 15th, 1971. It was developed in the first instance in a long conversation that I had with Secretary Connally in the Oval Office. It was discussed in great length in memoranda from people within the Administration who had diametrically opposed views and who wrote those memoranda to me, all of which I read, and who then when they were together, when we met at Camp David, expressed those views. I made the decision. The views resulted in the floating of the Dollar/Wage/Price Controls, the Freeze.

And the other matters, particularly the imposition of 10% Import Duty, as you recall, on foreign cars and so forth.

I give those two examples and there are others, [38] only to show that while the word secrecy is one to us in a free society is abhorrent, that in terms of decision making it is indispensable.

For example, the long and tortuous process which resulted in ending the Draft and ending the American involvement in Vietnam and ending the press of war required secret negotiations over many, many months. At any time had there been disclosure thereof or if at any time the individuals with whom we were in contact had

thought that their preliminary reviews would be made public, the American involvement I think would not have ended as soon as it did.

I am suggesting that as far as a President or any other officeholder is concerned that to the greatest extent possible not only his decisions but how he reaches those decisions should be made public. But I am also suggesting that, I know that if individuals who advise a President do not assume that their advice is going to be given in confidence they are going to be giving advice that has a eunuch quality. Some did anyway. But the best advisors I had, I must say, were those who expressed views far, far apart. And without belaboring the subject too much, the great debate over Welfare Reform which, as you know, I finally approved the Family Assistance Program. And in this instance, since it has become – oh, since it has now been written in a book by Mr. Moynihan, but long after the issue is no longer lively and therefore it is proper for him to write it, but in this instance my top economic advisors for Domestic Affairs were poles apart, but I had to see and hear their views in order to make what I believed to be the right [39] decision, even though it was not implemented by the Congress, if they had not felt they were expressing them in confidence.

And I speak here not only for my own office, my own tenure in office as an individual but for the Office of the Presidency in the future and for that matter for all of those who hold office, because once this precedent is established of appropriating not only the President's private thoughts and papers and diaries, et cetera, but also all of the information that comes in to him with the assumption that it is to be secret, once it happens here then inevitably, in my opinion, it will move on and affect future presidencies. It could move over possibly even to the Judiciary, very unlikely to the Congress because the

Congress, as you know, is quite jealous of its prerogative, in a sense.

Q. You are speaking of contemporaneous confidentiality, are you not? That it would have been destructive had there been a leak of your preparation to establish, to reestablish relations with China before the fact?

A. Oh, no. No. It affects the individual involved who gives the advice for years to come. Individuals like Dr. Kissinger, who was very active in those negotiations, will probably be, and I would hope he would be, in public service for many years to come. And the conversations that he had here, and I realize that under the statute there are certain safeguards that are provided for national security, but here again what we are talking about is how those safeguards are to be implemented. But you will find that as far as individuals are concerned, that they are thinking of their future.

[40] A Congressman or Senator doesn't give advice without thinking of what is going to happen to him in the next election or if he is planning to move up from House to Senate or from House to Governor or whatever the case might be he doesn't want anything spread in the public record that might later prove to him to be embarrassing, not in a personal sense but which would inhibit his freedom of expression.

As a matter of fact,–

Q. You indicated– A. Go ahead, interrupt.

Q. I am sorry, I thought you had completed your answer. A. I don't mind being interrupted, I am used to it.

Q. You indicated that you had no objection to Mr. Moynihan's revelations with respect to the Family Assistance Planning, because it was long after the fact; is that correct? A. Yes, that is true.

Q. Did you have any objections to Mr. Kissinger's revelation of conversations with you by his biographers

Messrs. Kalb, as they appeared in their biography of him? A. No. I frankly haven't had an opportunity to read those.

Q. I see. Did you forbid Mr. Safire to report conversations with you that he had attended in his book Before the Fall or was there no objection to those disclosures? A. It is inevitable that individuals who are in the administration, who leave it, are going to write their memoirs with regard to their role in the administration and they will see it from their vantage point.

[41] Mr. Schlesinger did in his Thousand Days and Mr. Sorensen did and others will do so. So as far as I am concerned, but that is far different from what the statute provides. Each of them, like a fly on a wall, sees only or hears only part of the story. The full story is something else again and the full story is something that can only be obtained from the whole range of presidential materials that is the subject of this suit.

For example, I note the Reporter's Committee have placed apparently considerable stock in affidavits by Mr. Novak and Mr. Lisagor and that after all they are ready to release anything, why should they worry? I am shorthanding what I understand the advantages are.

Let me say, I have great respect for both of those individuals as being good investigative reporters. They think they know but in some instances what they know is inaccurate and in other instances – and in all instances it is only a very – it is only a part of the story. A good newsman has the responsibility to develop, as he can, his so-called sources just as a good – as any individual attempts to develop a line of communication with individuals that can be helpful to him. But as far as those that we call "leaders" are concerned, anybody who is sophisticated in the political area and who has been in it as long as I have is usually able to make a pretty good guess as to,

when he reads an article which does contain a leak, who the leaker is and his remedy, while it is not a legal remedy, is a very effective one. The individual who is a leaker doesn't find out things in the future.

Q. Did anyone who participated in conversations about [42] what you describe in Paragraph 20, and let me get the page because that is a long paragraph, Page 15, which you describe as "dramatic changes in foreign policy" and conversations with respect to crucial domestic issues, if any individual stated specifically that disclosure would inhibit that person from giving what you say or what you describe in your Affidavit as "free-wheeling, candid, and often blunt or critical advice."

A. It was implicit in the conversations that I had with them. After all, as I pointed out, I indicated for every individual who came into a position of responsibility with me and to several members of the house and several democrats and republicans, with whom I often talked in confidence, that they could tell me anything and it wasn't going to get out as far as I was concerned. Sometimes it got out as far as they were concerned.

Now, I would say also, in answer to your question, that it had an enormously inhibiting effect on what a foreign leader might say to a President of the United States. I had the custom of what is called a "one-on-one." It was not always followed. Sometimes we would have what we call plenary sessions.

Q. Sir, let me interrupt. A. Let me finish the answer, then you can interrupt. I found that because I had developed a reputation, going back over twenty-five years, of never disclosing a confidence, or at least not knowingly doing so unless I had the implied or expressed permission of that leader, that that leader would talk very frankly with me. It was on that basis that we were able to develop not always a friendly relationship but at least a

relationship of negotiation rather than confrontation with [43] the People's Republic of China, with the Soviet Union, leaders of the Mid-East, with the leaders of Europe as well as other nations throughout the world, and that is invaluable to a President. I know, for example, that when what we call the Pentagon Papers came out, that we received a number of cables from countries abroad concerned that their private conversations and so forth, even though they dealt only with the war in Vietnam, it might become public. The same is true when the so-called – what has been called the taping system, not so-called, it was a taping system, became known. This had a chilling effect, certainly in terms of what they might say in the future. And, of course, having in mind that this legislation, potentially due to the fact that it set up a commission to deal with future presidencies, that this legislation would tend to open the door for further disclosure in future presidencies, and probably even in past presidencies, of what had been assumed to be confidential information, I think will inevitably have a chilling effect not only on those who advised the President, but also on those who, I might suggest, and I am speaking of those who had advised the President in his official family but in the broader context of the political arena, House and Senate and Governors, et cetera, in the private sector, and I cannot emphasize in terms of the President's foreign policy responsibilities, even in the foreign policy area, recognizing that the legislation purports to cover the National Security area in a way that would not inhibit in that concern but also recognizing that as far as any individual is concerned, while they might trust a President or former President's discretion with regard to revealing a confidential discussion, they [44] would not have the same confidence in a bureaucrat's decision on a matter of that sort. An example is, and this letter just arrived yesterday from an individual I haven't heard from perhaps

for one or two years, but I have known him as I entered public life twenty-seven years ago, Mr. Morris Ernst, and you can tell he is an old friend because he refers to me as Dick. He says "Dick, I see in the New York Times that there is an attempt to get from you your personal mail. You may recall that for some years I had put on the top of my letters, 'Burn before reading.' I am quite sure that I would have written differently if I would have thought that my random letters would have become public. Best regards. Please return all my letters."

Now, that is we take a Morris Ernst, we take, for example, one in the economic community who is not a favorite with the liberal economists, Pierre Renfret. What individuals like that would do in the future, with regard to giving their very learned advice to the President, I don't know, in the event that this legislation is upheld and then is made to apply to future Presidents. But I do know this, that to me, in the conduct of a Presidency, it has been invaluable to have views on the domestic scene, in the foreign scene, from the broadest possible spectrum. That is one of the reasons why when people have come into my office I have the reputation of being the devil's advocate and I will present a view as being my own, remembering what Dr. Arthur Burns told me, to see whether the individual concerned is there just to pander to the President's views or to express his own. Good lawyers do the same thing.

[45] I am convinced, as far as future decision makers are concerned, that the quality of the decisions will reach the lowest common denominator in the event that the confidentiality of the discussions that takes place is impaired and inhibited or for that matter destroyed.

Q. I take it the answer to my question, which was: Did anyone ever specifically state that the disclosure of the conversation would inhibit them from giving candid

and blunt or critical advice? And the answer was "No, it was implicit"?

A. I read this letter from Mr. Ernst from the outside. I would say, and I know Counsel would not want to try to put words in my mouth, but I used the word "implicit" but then went on to say that because I had so informed my staff and because I had a reputation over the years of being, frankly being very closemouthed about advice that I had received much, incidentally, to the disgruntlement of the members of the press, because they felt that all of the foreign and domestic policies and advice that inevitably goes on, conflicts and competition in the official family, should be presented in the public record. Some should, sometimes it is healthy, and some should not. And in the cases where it should not be spread in the public record is where an individual who gives advice, thinking it is going to be confidential and then feels that he would be inhibited from giving such advice in the future if he stays in an advisory position, if we want to talk about his First Amendment Rights, I would think that he would feel very concerned that he would be embarrassed politically, not embarrassed personally, by the fact that he had written or expressed views [46] that historically later seemed so outlandish at the time.

Q. Mr. Nixon, the deposition will be shortened considerably if you can just answer my questions as asked. Obviously you are entitled to explain your answer, but I hope that we can move on a little more rapidly now.

MR. MILLER: My silence is not an indication that I accept your characterization of it. It seems to me the answer was precisely what you called for.

THE WITNESS: As I recall, Counsel asked me if I had any other selected areas outside of the deposition. He said is your case based only on this and I proceeded to take one area which went far beyond that. Now Counsel

can go on with specific questions and get specific answers.

MR. DOBROVIR: I will endeavor to do that.

BY MR. DOBROVIR:

Q. In your affidavit, on Page 13, you refer to a conversation with "the ranking minority member of a House Committee." And you state "I do not believe the ranking minority member would have felt free to discuss this delicate situation if he had believed that his communication would later be made public."

Did the ranking minority member say that to you?

A. Say that to me?

Q. Did he say that he would not have felt free to discuss this delicate situation if he would have believed that his communication would later be made public? A. Let me read from the Affidavit.

[47] Q. Please. A. It was important that I be aware of this in order to be in a position to determine what course of action I should take as to particular legislation. I do not believe the ranking member would have told me or discussed this delicate situation if he had believed that his communication would later be made public.

Q. My question was: Did he say that he would not have felt free to discuss the situation if he had believed that his communication would later be made public? A. I have no recollection of his having said that, but I am confident that he would not have said it because we had that kind of relationship.

Q. Thank you. A. And also it would have destroyed him politically if it had been public, self-interest would be involved.

Q. Was that conversation taped? A. It was.

Q. Did he know it was being taped? A. No.

Q. Was the principle of confidentiality to which you referred, breached by John Dean in his testimony before

the Senate Watergate Investigating Committee? A. I think, as I recall, that I waived the attorney-client privilege in his case. He was counsel to the White House, as you may recall. They asked for a waiver and I gave it, I granted it. Obviously the attorney-client privilege does not hold once the waiver of confidentiality is not an issue.

[48] Q. Did you not state, on April 29, 1974, and I am quoting from your speech to the nation on television that "I am making a major exception to the principle of confidentiality, because I believe such action is now necessary in order to restore the principle itself, by clearing the air of the central question that has brought such pressures upon it and also to provide the evidence which will allow this matter to be brought to a prompt conclusion"? A. Yes, I made that speech.

Q. Do you still hold to that view, with respect to the events commonly denominated as Watergate? A. Yes.

Q. Then do you agree with the Congress of the United States that there is a need to provide the public with the full truth at the earliest reasonable date of the abuses of governmental power, popularly defined under the generic term "Watergate"? A. Do I – may I have the first part again.

Q. Do you agree with the Congress of the United States, that there is a need to provide the public with the full truth at the earliest reasonable date of the abuses of governmental power, popularly identified under the generic term "Watergate"? A. Would you like to be more precise as to what is popularly known as "Watergate," apart from the so-called legal matters that are in the courts? Do you want me to comment on those?

Q. I am referring to Section 104-A1 of the Act which you were challenging in the lawsuit as unconstitutional, an act which was signed by President Ford.

[49] MR. MORTENSON: Counsel, it is a matter of the position taken by Counsel for plaintiff that the term is not reasonably definable and you ask this plaintiff whether he agrees with what Congress states. If it is not reasonably definable, that puts him in an impossible position to answer.

MR. DOBROVIR: Let me try and ask it another way then.

BY MR. DOBROVIR:

Q. Do you believe that the full story of the activities carried out by you and members of your staff, that had to do with the concealment of various aspects of the Watergate matter should be made public in their entirety? A. The Affidavit, I believe, answers that question, pointing out that we have cooperated with the Special Prosecutor and as of this time we have satisfied all of the requests of the Special Prosecutor for documents, tapes, that he has made. In addition, of course, I have given testimony to the Special Prosecutor Task Force on a number of the issues other than those covered by the matters currently in court.

So my answer to the question is that in view of that cooperation, I believe we have complied with the spirit of the statement that I made on April 29th and also with the Congressional statement that you have just read.

Q. Do you believe that the public at large, as opposed to the Special Prosecutor, has a right to know the complete story?

MR. MORTENSON: The full story of what?

MR. DOBROVIR: Watergate.

[50] MR. MORTENSON: What do you mean by "Watergate," Counsel? The building?

MR. DOBROVIR: No, I mean by Watergate, I am asking the question in this sense: All the activities that occurred after June 17, 1972, up through August 9,

1974. I only use that date because that was the date Mr. Nixon resigned from office. Relating to what is popularly described as the "cover-up."

Now, if the witness knows what I mean by that, I would like him to answer the question.

MR. MILLER: The witness may know what you mean but I don't.

MR. DOBROVIR: Well, if the witness knows, I would like the witness to answer. A. Counsel has given you the answer.

BY MR. DOBROVIR:

Q. Counsel has said Counsel doesn't know what is meant by "Watergate." A. If my Counsel doesn't, I would never put my wisdom above his.

Q. Do you know what is meant by "The Watergate cover-up"? A. I know what several people have written.

Q. Can you tell me what you understand it to mean? A. I can only tell you that we have cooperated with the Special Prosecutor in all of his requests and that insofar as any activities on my part are concerned, that they have been disclosed to the Special Prosecutor, who is responsible in this [51] area. And beyond that, I have nothing further to add.

MR. MORTENSON: Counsel, you are putting the plaintiff here in an impossible position to answer your questions, because of the fact that in cooperating with the Special Prosecutor's Office and providing the Grand Jury, through the Special Prosecutor's Office testimony and documentation, that that material becomes subject to the Grand Jury's proceedings and the laws regarding disclosure thereof. And to ask the plaintiff if he believes the American people should have access to these items, which pertain to what we don't seem to be able to extract as a definition of Watergate, would require him to conclude that he disagrees with the laws that provide for

secrecy of the Grand Jury. And I think that is an impossible task for him.

MR. DOBROVIR: My question and the whole examination relates not to what the witness has stated to the Grand Jury or to any other law enforcement body, but rather to what is contained in the presidential materials that are the subject matter of this lawsuit, Mr. Mortenson.

Let me try another definition, what I am talking about, to see if this will help the witness to answer.

BY MR. DOBROVIR:

Q. Do you believe, Mr. Nixon, that the public is entitled to full disclosure of everything that is in the presidential materials, that relate to the break in at the Democratic National Committee Headquarters on June 17, 1972, and subsequent efforts by anyone to conceal the involvement of the Committee for the Re-election of the President, with that [52] break-in.

A. Well, the answer to your question at this point is not at this time, in view of the legal proceedings that are underway and in view of, as we have already indicated, when I speak of legal proceedings, including the Grand Jury proceedings. However, I would anticipate that in the future, that in the presidential library, that all of these matters would be made public, because they are not in the provided – they were not in the category of the – let me put this more precisely.

These matters, in which there was a public interest since the tapes as well as the documents, et cetera, would be delivered to the library. It would be my intent that, except where there would be a violation of the guidelines, that former Presidents under the Presidential Library Act of 1955, which passed when I was Vice-President of the United States, and that under those guidelines that mat-

ters involving Watergate would be among those made public.

I should point out what we are talking about here is, well, of course of great public interest, in view of how much has already been made public and in view of the present status of the matter. I find that less than one percent of the presidential materials, the number 42 million documents, conversations and so forth, is Watergate-related in any respect. But we are not talking about a great deal of material.

Q. If I can summarize your answer. You are saying that you agree it should be made public but not at this time?

MR. MORTENSON: I think the answer stands for itself in the record as stated. If you want the reporter to read it back [53] so you can get it,–

THE WITNESS: The reporter can read it back.

MR. MORTENSON: Let that stand in the record or not to agree or disagree with your characterization.

BY MR. DOBROVIR:

Q. When do you think that this material should be made public? A. Pardon?

Q. When should this material be made fully public? You said not at this time. A. Hell, first of all we have to get the decision made with regard to this action that we have brought so that I can have the opportunity to obtain the material and to segregate those portions that are private and personal. And, of course, whatever portions that might involve the national security there has to be a check.

I notice, for example with regard to tapes, that President Johnson placed a 50-year limitation, as you probably know, with regard to his tapes.

Q. My question is still with Watergate. A. I am not quite through and I have not interrupted Counsel in his,

Counsel's questions. And if Counsel will show me the same regard I would appreciate it.

President Johnson has placed a 50-year limitation with regard to any materials that were on tapes and now that he has passed away, of course whether or not members of his family or others may decide to move before that time, to make [54] some of them public, remains to be seen. But I think that is too long.

In the agreement that I have, that I will eventually work out, the letter of intent with the University of Southern California and so forth, I intend to provide for making first, of course, for proper review of the tapes, which can only be undertaken by me and members of my family, because of the private and personal conversations that are there and for making them public as soon as those reviews are completed.

MR. MORTENSON: Let us take a brief recess.

(A brief recess is taken at this time.)

BY MR. DOBROVIR:

Q. Let me ask the question then, Mr. Nixon. Do you have a time period that you expect, within which to make full disclosure of all the Watergate matters? A. No.

Q. Do you expect it to be longer than five years? A. I can't tell until I see how big the task is. Most of the tapes are not as audible as the one you played at that cocktail party.

Q. How long do you expect it will take for you and the members of your family to review all the tapes, Mr. Nixon? A. I don't know. But we will do it as expeditiously as possible.

Obviously, as Counsel is aware, we won't have access to the tapes until this case is decided, which, as I understand, at the earliest will be next spring. But by that [55] time the tape review process could begin and I have some ideas as to how it could be expedited and I do want,

because of the great interest in the tape material, I want it to move as quickly as possible. What is the Supreme Court's statement? With all deliberate speed. A little faster than that, particularly as it applies.

Q. But only yourself and Mrs. Nixon and your daughters will be listening to the tapes; is that correct? A. Yes. Well,–

MR. MILLER: May I ask, Counsel, what the relevancy of the time period is to this lawsuit?

MR. DOBROVIR: Well, we are discusing a section of the statute with which Mr. Nixon disagrees, which provides that the public should be provided with the full truth at the earliest reasonable date. And I am just trying to get some information.

MR. MORTENSON: Counsel, you are characterizing–

MR. DOBROVIR: Let me finish. Please don't interrupt, Counsel, we must have this evenhanded – so that we can have some basis for understanding what the witness' plan is with respect to the time frame for release of the full story of Watergate.

MR. MORTENSON: I don't believe that your characterization of his agreement or disagreement with the statement contained in the statute is accurate and I just want the record to reflect that.

BY MR. DOBROVIR:

Q. Do you believe that the President has an ongoing constitutional responsibility to protect the confidentiality [56] of communications? A. I certainly do.

Q. And does that responsibility extend to communications with former Presidents – of former Presidents? A. It always has.

Q. And did you not seek to protect that interest when you sought, when you authorized the litigation to prevent the publication of the Pentagon Papers? A. Yes, that is correct.

I should point out that from a political standpoint, some of the members of my staff totally disagreed. In fact, most of them were against my decision to litigate on the Pentagon Papers matter, because it was no skin off our back. After all, when we came into power there were 300 men being killed every day and 550,000 in Vietnam at that time. We were drafting 34,000 a month, and this all reflects on the previous administration.

Well, the way I saw it was that far more important than who the Pentagon Papers may have reflected on, as to how we got in Vietnam and what we had done in Vietnam was the Office of the Presidency of the United States, that is why I felt that for the individual who removed the papers, top secret papers, although most of them were not particularly important some were vitally important, should not have been given a badge of honor and the paper that published them should not have received the Pulitzer Prize.

Q. But you felt it was part of your responsibility to protect the confidentiality of communications in the Kennedy and Johnson Administrations; isn't that correct?

[57] (At this time plaintiff and plaintiff's counsel confer.)

MR. DOBROVIR: I would like the record to show that Mr. Mortensen is whispering to the witness.

THE WITNESS: Yes. What Mr. Mortenson just pointed out to me was exactly the point that I was going to make and that is that what I was protecting here was the classification system itself. There were classified documents. If classified documents are leaked out in an administration and if no action is taken against those responsible for that leak, it becomes pervasive, confidentiality is destroyed and the ability to conduct the Presidency is seriously eroded. And this is particularly true in the foreign policy field. But as I say, it is also true in the domestic field

where you have such issues as Monetary Reform, International Trade, et cetera, involved.

BY MR. DOBROVIR:

Q. But it is the responsibility of the President, is it not,–

MR. MORTENSON: It is, is it not,–

MR. DOBROVIR: – of the President in Office–

MR. MORTENSON: – to protect classified documents?

MR. DOBROVIR: To protect.

THE WITNESS: I consider it to be that, to be my responsibility.

BY MR. DOBROVIR:

Q. And it is presently the responsibility of President [58] Ford, is it not? A. To the extent that he agrees with that, yes. Each President views the situation from his own likes. From my experience I had felt very strongly on this issue at that time. I should point out we were engaged in a very difficult war. That war slopped over at home and erupted into violence and was tearing the country apart. And I felt that at that time. Also we were engaging in initiatives not only to bring that war to a conclusion, as far as we were concerned, but initiatives to avoid that kind of action taking place in the future with those issues and for that reason I felt perhaps more strongly than even a peacetime President might feel, that confidentiality was absolutely imperative.

MR. MORTENSON: Counsel, let me interject for the record here that I object to the question as calling for legal conclusions of this witness. The record, I believe, made in this case is such that there is no claim that plaintiff, as a former President, claims the right, the duty under the Constitution, or statute, or any other basis, to either classify or declassify documents. And I believe that

it is a matter of law, the question of whether the encumbent Administration, the encumbent President is charged with the responsibility of protecting classified documents.

So to ask this plaintiff whether or not he views himself as having that responsibility or not is a matter of legal conclusion.

THE WITNESS: As I understood the question, the question related only to what was my responsibility at the time of the [59] Pentagon Papers and I intended my answer to be directed to that question.

MR. DOBROVIR: My further question–

THE WITNESS: Incidentally, could I ask, for the record, because I wouldn't want Counsel to feel we are violating any of the rules, I have, of course, no objection whatever to indicating that I consult with Counsel from time to time. Does Counsel suggest that is not to be allowed? What was the purpose?

MR. DOBROVIR: I have no objection to you consulting with your counsel with respect to such matters as to whether or not you are to answer a particular question or whether it is a proper or improper question. It is my understanding of the procedure in a deposition, however, that it is not proper for a witness to consult with his counsel with respect to the substance of the answer.

THE WITNESS: Well, I should point out to counsel that, as Mr. Mortenson has just stated, the question on which Mr. Mortenson was advising me was one that involved a legal interpretation as well as substance and many times it is not. But let me say on our part that I would like for the reporter to put down every time there is any kind of this thing so that Counsel does not feel that the record is inadequate in showing that I do consult with counsel. I will consult with counsel only when I feel there is a legal matter involved. But I have no objection

whatever to that and so Counsel need not raise that question again, I mean in any way that he wants.

Let's go forward with the questions.

MR. DOBROVIR: Thank you.

[60] THE WITNESS: At any time Counsel objects to my consulting with Counsel, I wish he would say so rather than making a remark as he did to the reporter, that let the record show that he consults with Counsel.

BY MR. DOBROVIR:

Q. On April 16, 1973, did you say to John Dean, and I quote, "Nothing is privileged that involves wrongdoing."

MR. MORTENSON: Counsel, let me interrupt. Is Counsel quoting from a document and if so let us enter the document into the record.

MR. DOBROVIR: This is a quote from Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974. It is a blue book, paperbound, approximately two and a half to three inches thick and I am quoting from Page 802. I would be happy to show it to the witness if he would like.

THE WITNESS: I do not recall the conversation specifically. I would not affirm nor deny that is the case, but I do not recall the conversation.

BY MR. DOBROVIR:

Q. Do you believe the proposition to be true, the statement "Nothing is privileged that involves wrongdoing"?

MR. MORTENSON: Again, Counsel, I object to the question as calling for a legal conclusion of the witness.

MR. DOBROVIR: I am asking the witness to do no more than [61] tell me whether or not be believes that that is true or not. And if you are instructing the witness

not to answer, that is fine, we will let the record so reflect.

THE WITNESS: What is the definition of "wr g-doing"?

BY MR. DOBROVIR:

Q. I am quoting your words, Mr. Nixon. A. I am asking you, what do you say is wrongdoing? I don't know your definition.

MR. MORTENSON: Counsel, you are stating that, the witness has said he does not recall the conversation. You have then asked the witness whether or not he believes the general proposition and you have stated a general proposition. We need to know, in order to answer that, first of all because it calls for a legal conclusion, what interpretation of that proposition you are making.

MR. DOBROVIR: I am making no interpretation of the proposition. The question is clear. If the witness is unable to answer it as stated let the record so reflect.

THE WITNESS: Is Counsel's interpretation of wrongdoing an engraving in illegal activity?

MR. DOBROVIR: I have no interpretation of the word, I simply ask the question.

MR. MORTENSON: I will instruct the witness not to answer the question because it calls for a legal conclusion stemming from the Fifth Amendment and a variety of other privileges that might apply, depending on what your definition of the proposition is and you are unable to or unwilling to state that, so I cannot [62] let the witness speculate what that means.

THE WITNESS: I would like to add to that, even though my Counsel instructed me not to answer, as far as wrongdoing is concerned, I am not trying to debate with Counsel on the subject of what wrongdoing is and particularly in the present day, it is a very broad term that in the eyes of some is very limited. Lawyers usually inter-

pret wrongdoing as being matters of which involve breaking the law. Others might consider wrongdoing an American, for example, in 1945, as many of them did, supporting the de Gasperi Government in order to avoid a communism overthrow.

The point that I make is that in terms of wrongdoing, unless the question is put more precisely I shall have to follow counsel's direction in order to respond.

MR. DOBROVIR: Very well.

THE WITNESS: I can also say that I should also point out that not only with regard to the Johnson tapes, in which there is a fifty year, as you know, restriction with regard to their being made public but also with regard to the Kennedy tapes, of which there are several hundred in Hyannis Port, as I understand, they obviously, their families now, and the President's at the time that they set up there or made plans for their library, wrote their letters of intent, each have had a right to place such conditions on their release as they thought were proper.

Implicitly saying that as far as I am concerned, that I have always felt that an administration, after a President leaves office, a President or Congressman or Senator [63] or Vice President, should be very forthcoming with regard to the conduct of his office. And in my review of the tapes I shall, of course, follow that policy.

I should also point out that when Counsel earlier, as he very properly did, went into the subject of what is called the Watergate tapes, then, of course, limited it to what he called the Watergate cover-up, that here we have two different questions. First we have what is basically a legal question, and that is whether or not a President or former President should waive privilege, which I have done, where illegality is charged. We have done so. The Special Prosecutor has been appointed and we have cooperated with the Special Prosecutor.

Now, with regard to the situation on any further release of material in what is called Watergate, I want to leave no implication of any intention of what Counsel has referred to as cover-up or nondisclosure or what have you. However, I cannot at this time and will not violate the legal procedures with regard to a Grand Jury, with regard to defendants who are on appeal. And all that I can do is to cooperate with the Special Prosecutor, which we will do after that period is completed. Then I shall determine, but not the Congress, I shall determine what can appropriately be made public. And as far as that matter is concerned, I shall follow the same guidelines that all former Presidents since the Presidential Libraries Act was passed in '55, President Hoover, President Kennedy, President Johnson and President Eisenhower followed, except that I will be as forthcoming as possible, particularly with regard to the tape matter.

[64] BY MR. DOBROVIR:

Q. Do you claim – A. As I say, what I have just said I do not mean to imply any criticism of President Johnson and I don't know what President Kennedy's decision or his family's decision with regard to the release of their tapes. That is a decision for them to make, because those conversations, conversations that are more than anything else in the President's materials, are his and his alone not for profit but because they are so intimate because they go far beyond what a note taker might write and under those circumstances therefore the President should have a right to make a determination as to whether or not and how and when there should be a disclosure. And in my case I am indicating my own intent to disclose, to make public the tapes, having in mind the national security problem, the embarrassment, the private issue. By "embarrassment," I am speaking of personal embarrassment and not speaking of embarrassment with illegality, of course.

Q. With respect to the question of privacy and embarrassment, besides yourself who had knowledge of the taping system, that is when the taping system was in operation? A. The Secret Service operatives, Mr. Butterfield and Mr. Haldeman. I don't believe any others knew.

Q. Did Mrs. Nixon know? A. No.

Q. Did either of your daughters know? A. No.

Q. Did your personal physician know? [65] A. No.

Q. Did your attorneys know? A. No.

Q. Do you claim— A. Incidentally, my secretary didn't.

Q. Did not? A. No.

Q. Miss Woods? A. She didn't know.

Q. Do you claim, as part of the presidential materials included in this lawsuit, documents prepared by members of your White House Staff for their own use? For example, handwritten notes that Mr. Ehrlichman would take of meetings with you. A. For my use or his?

Q. For his use. A. Well, handwritten notes that he made of me would be made for my purpose and for my files. Those were the instructions. If he was the note-taker, those notes were made for me and they became part of the presidential materials. If on the other hand he was doodling, which he might often do, or making a note to himself, they belong to him.

Q. Do you claim as part of the presidential materials included in this lawsuit recordings that either Mr. Ehrlichman or Mr. Colson made of their telephone conversations? A. No.

Q. The answer was "No"?

MR. MORTENSON: Are you asking of all records?

THE WITNESS: What are you talking about? Recordings of [66] whose telephone conversations?

BY MR. DOBROVIR:

Q. The record is that Mr. Colson and Mr. Erlichman sometimes recorded their telephone conversations from their end and that those telephone conversations, after being recorded, were somtimes transcribed. I am asking you if those are included in the presidential materials which you claim ownership of in this lawsuit? A. I would have to differentiate. If the telephone conversation was a private conversation that they were having, with regard to their own business and so forth, that was one thing, that is theirs. If the conversation had to do with a direct presidential assignment for the purpose of the President, the telephone conversation and its transcription would be part of the presidential materials and in such instance the decision would depend upon the subject of the conversation.

Q. Do you claim – A. As I should point out, Counsel, I think the record will show that their conversations, that the only, I believe, made records of conversations on official business and not personal, but it could have been otherwise. I don't know. They never told me.

Q. But the records of conversations on official business are included in the materials which you claim? A. On official business having to do with the presidency, yes.

Q. Do you claim FBI records of electronic surveillance [67] of seventeen individuals, which was ordered in May of 1969, to be part of the presidential materials included in this lawsuit? A. Well, if any FBI records – I think perhaps we can shortcut just a bit here by going further than that. The FBI not only furnished such records but they furnished highly classified records whenever we made appointments to the Judiciary, to the Cabinet, et cetera. So-called raw files were sent to us and all of those, all of the record that the FBI made, where we requested them, I would consider part of the presidential material; yes.

Q. On April 30, 1973, did you order that the FBI records of the surveillance of these seventeen individuals be placed among your papers? A. I don't know. I can't recall it.

Q. All right. Do you claim as part of the presidential materials involved in this lawsuit documents transmitted to members of the White House Staff, not addressed to you, from foreign governments? A. Excuse me. Whether members of the White House Staff?

Q. Documents transmitted to members of the White House Staff not addressed to you, which came from foreign governments, do you claim that those are part of the presidential materials which you claim ownership of? A. It would depend again, Counsel, on the nature of the correspondence. For example, such correspondence would primarily come to Dr. Kissinger or sometimes General Haig and in most instances that I can recall, while the correspondence went to them, the correspondence went to them with the thought that it [68] was part of our ongoing dialogue and that it would be made available to me for my consideration. If it was correspondence of that type, yes, it is part of the presidential material. If it is, however, personal correspondence with regard to a trip of a member of the White House Staff, for example Mr. Rumsfeld took a trip to Europe which was part official and part personal, and Mr. Finch went with him. They had a lot of correspondence. I would not consider that unofficial correspondence as part of the presidential material.

On the other hand, their report on the trip, the conversations that they had and any communications that they had thereafter dealing with the substance of their trip, even though this was in a domestic area, would be presidential area.

Q. When you refer to correspondence addressed to you, do you mean correspondence addressed to you with

your name or as President, or do you also include correspondence addressed to your principal aides without specifically designating that it is addressed to you? A. The way it worked is that many private citizens in this country and some foreign officials often addressed their correspondence to an aide because of his desire to be sure that it came to my attention. If it was addressed just to me it might get in the mill and they felt, sometimes justifiably, it might not be brought to my attention, so it came both ways. But the substance of the correspondence would determine whether or not it was presidential material or whether it was their materials.

Q. Do you claim included in the presidential materials [69] in this lawsuit documents prepared by members of the White House Staff for internal use that were not intended to be transmitted to you and that were not transmitted to you which dealt with government business, their official business? A. It is very difficult to separate that out from official business, what we call presidential materials, because within the White House Staff there might be a memorandum that was written from one staff member to another but because the staff member, say at a lower level, might not think a memorandum written directly to the President would get to him. I recall one in particular, because it has become rather famous, a memorandum a Mr. Liddy, whom I didn't know, wrote to Mr. Bud Krogh, in which he recommended strongly that Mr. Hoover resign. Normally such a memorandum would never come to my attention, but Mr. Krogh showed it to Mr. Ehrlichman and Mr. Ehrlichman thought at least it was something I should consider and it came to me. I would consider that to be presidential material, because the purpose of the memorandum basically was to affect presidential action.

Any memorandum that is supposed to influence presi-

dental acts, presented by a staff member is presidential material.

Q. In Paragraph 23 of your Affidavit, you indicate as a reason for installing the tape recording system a recommendation that you received from President Johnson by way of a close mutual friend. And you indicate that President Johnson urged you to do so because the taping system he had installed had assisted him in writing his memoirs. Who was that close [70] mutual friend? A. Mr. Don Kendall.

Q. How did he communicate President Johnson's recommendations? A. Through Mr. Haldeman.

Q. In writing or orally? A. Orally. Basically I can explain it quickly and probably answer all your questions.

Mr. Kendall was a member of the Nixon Foundation and along with several others who were members of the Foundation visitied various presidential libraries and President Johnson graciously asked him to come visit, to give advice with regard to the libraries.

At the time they made their visit to the library, President Johnson in a discussion with Mr. Kendall, and whether others were present or not I do not know, at least in a discussion with Mr. Kendall I can say firsthand and not hearsay, said that he had noted, President Johnson had noted I had ordered all electronic equipment out of the White House. I think what he was referring to was the fact that I had gotten rid of the television sets and so forth and so on. And there was a lot of equipment I didn't know about, other equipment was there. But I said to clean it all out, we want to run our own show.

In any event, President Johnson said to go back and tell President Nixon that it is vitally important that he install or reinstall, what term was used I do not recall, but a system for taping, because he said he found it proved [71] invaluable in writing his memoirs and also he

thought very important in terms of a presidential library to have this kind of material in it.

Mr. Kendall came back and reported the findings of the Committee to Mr. Haldeman. Mr. Haldeman came in to see me. This I recall quite clearly, it was a very brief conversation, and he said President Johnson had recommended that we put in a taping system. And I said to limit it to the offices and not in the residences and no taping of staff members' telephones and so forth and so on, which apparently, at least I cannot say this for sure, but apparently had been part of the Johnson system. It has been alleged by some, whether that is true or not I do not know.

But in any event, the taping system was then installed, my memory, the reason I use Mr. Kendall's name here, is not that I independently recollected that Mr. Haldeman told me Mr. Kendall was the one who came in to see him but Mr. Kendall, oh, two, three months ago was a visitor here at my house and told me that he was the one that had recommended the taping system and for that reason I can say that Mr. Haldeman's recommendation to me had come from Mr. Kendall and Mr. Kendall had gotten it from Mr. Johnson. And Mr. Kendall recounted in detail his conversation with Mr. Johnson and Mr. Johnson's concern about my not having any taping system whatever.

Q. Did you ever speak to former President Johnson at any time subsequent to your receiving this communication? A. No, not about that.

Q. My question is: Did you ever speak to him at all [72] subsequent to that communication with former President Johnson? A. Yes.

Q. And in none of those conversations did you mention the taping system? A. No. I am sure he assumed we took his recommendation.

Q. But you never discussed the matter with him? A. No. Incidentally, when I saw President Johnson on two occasions in the period between the nomination and the election, he did not mention the conversation was taped. Also when I saw him and members of the National Security Council after my nomination but before the election, just as I saw Mr. McGovern and also Mr. Wallace, he did not mention that the Cabinet room was taped. It would have been quite interesting to have that tape.

Q. So one reason for installing the taping system was to have a record for your use in writing your memoirs; is that correct? A. That was a reason that Mr. Johnson, President Johnson had indicated to Mr. Kendall, was a good reason to put it in. I frankly was not thinking of writing memoirs at that time. I had in mind at some day I would. I had other things I was thinking of. This is early 1971. My reason for approving it was that was primarily because of the historical significance. I knew of it, particularly in the foreign policy area, of the conversations that were taking place and I felt having those conversations taped for purpose of history would be very, very useful and that it why it was done.

Q. That was the reason? [73] A. That was my primary motivation.

Q. Were there any other reasons? A. No.

Q. So that was the sole reason? A. I didn't say it was the sole reason.

Q. I am sorry, I don't want the record to be incorrect. You said it was the primary reason and I said are there any other reasons and I thought you said, "No." A. Well, Counsel, there is no reason to quibble. I said as far as memoirs were concerned, I wasn't thinking of memoirs specifically at that time, although I intended sometime to write memoirs. And President Johnson had indicated that he had found it very useful in the memoirs and certainly in my mind, thinking about reasons, President Johnson's

reference to memoirs must have been a consideration. My reason, primary reason, and we want to be quite precise, was that I felt that for historical purposes, particularly in the foreign policy area, it would be well to have conversations taped.

Q. All right. So your primary reason was for historical purposes and another consideration was the possibility of use in your writing your memoirs. Were there any other considerations? A. No.

Q. Just those two? A. None that I can recall.

Q. Thank you.

Do you know whether Henry Kissinger, when he was your National Security Advisor, had his telephone conversations taken down in shorthand by a secretary?

[74] A. I have no knowledge of that.

Q. You have no knowledge of that. You were never advised at any time that that might b e case? A. No, I didn't ask him. The secretary didn't tell me. If she had I would have told him to discharge her.

Q. You would have told him to discharge her? A. Yes.

Q. For telling you? A. Yes. She was working for him.

Q. I wasn't asking about whether the secretary told you or not, I was merely asking you whether you had any knowledge of that and your answer is "No"? A. All right.

Q. Are you aware that in the John Ehrlichman files, presently included in the presidential materials that are involved in this lawsuit, are copies of the CIA psychiatric profile of Daniel Ellsberg? A. No, I am not personally aware of that. I have been informed that that could be the case.

Q. Do you claim those documents as part of your presidential materials involved in this lawsuit? A. Yes. I think they would be part of the presidential materials; yes. Because whatever was done in this particular area was done in its official and not in an unofficial capacity.

Q. Which of the interests that we earlier identified would be protected by your having the exclusive control over those materials. A. The Ellsberg case?

[75] Q. That is right. Mr. Ellsberg's psychiatric profile is what I had reference to. A. Well, I would suggest first that that material, it seems to me, would come under the provision, the guidelines that I intend to lay down in my letter of intent in regard to what I consider to be private or embarrassing material. And I am speaking in terms of its disclosure, and to the extent that it involved Mr. Ellsberg's activities and their removing top secret documents from the various places he was employed within the government. That would fall within the strictures of the National Security test, except, of course, to the extent that the Supreme Court and Court of Appeals' opinion and the Pentagon Papers case makes that no longer a National Security item. I have not seen his profile, incidentally.

Q. Are you familiar at all with the General Services Administration regulations under the statute that is in issue in this case? A. Yes, I am familiar regulations were issued. I have not studied them carefully; no. I have not done so because I feel that we should first try to prevail in the suit and if we do not prevail I, of course, will study them very carefully.

Q. Are you aware that the regulations provide expressly for your access to the materials, the statute and the regulations so provide? A. Access under certain circumstances, as I understand. Certain conditions and access also by others.

Q. Would your interests be satisfied, Mr. Nixon, if either a complete copy of all of the Presidential materials were [76] made and transmitted to you for your use here at your home or if the originals were transmitted to you and a complete copy remained to be administered as provided in the statute? A. No, that misses the point of the

whole case. Because the point of this case is not just access for me for purposes of writing my memoirs, the point of this case is much more fundamental and profound. It goes to the issue of – a number of issues, but particularly the separation of powers issue. The principle of confidentiality, which I have addressed directly earlier and access to me, when coupled with access to government bureaucrats on a wide-scale basis, individuals who even with the best of intentions would not be able to make the fine judgments which, and by fine I mean the delicate judgments with regard to what is private and what is personal and what is political and what is embarrassing, what is National Security, et cetera. In other words, I beleive that the Presidential Libraries Act which, as I say, was passed in 1955 during the Eisenhower Administration, very appropriately considered a precedent that was not in law but just understood since the presidency came into being two hundred years ago, the Presidential Libraries Act provides that a former President first has the discretion and the sole discretion to make decisions with regard to the disposition of materials that were accumulated during his presidency.

MR. MORTENSON: I want the record to reflect that in counsel's position, counsel for the plaintiff's opinion, the question was replete with requests for legal conclusions by the witness. I think the pleadings in this case are clear, to [77] the extent that plaintiff does not believe that this statute adequately protects his rights; his rights, for example, under the First Amendment. I believe it is a legal conclusion to be decided by the Court, whether the provisions of the statute do adequately protect that interest.

Plaintiff is on record with filing the Complaint that the statute does not in any way, in his opinion, protect his interests as set forth in the Complaint.

MR. DOBROVIR: Thank you. It is time for our noon recess. We will convene at one o'clock.

(The time is 12 m. At this time the noon recess is taken.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RICHARD M. NIXON, Individually
and as the former President of the
United States

Plaintiff,

vs.

Administrator of General
Services, et al.,

Defendants.

No. 74-1852
Deposition of
RICHARD M. NIXON
VOLUME II

Deposition of Richard M. Nixon, plaintiff herein, called by Defendants in Intervention pursuant to Notice of Taking Deposition, on Friday, July 25, 1975, at San Clemente, California, before Joseph F. Weitzen, a notary public.

APPEARANCES

For the Plaintiff: Miller, Cassidy, Larroca and Lewin
by: Herbert J. Miller, Jr.
R. Stan Mortenson

For Intervening Defendants: William Dobrovir
Andrew S. Krulwich
Mark J. Spooner
Leonard B. Simon

For Defendant United States of America and Administrator of General Services:	United States Department of Justice IrwinGoldbloom David J. Anderson
For Special Prosecutor, Intervenor:	Watergate Special Prosecution Force Kenneth S. Geller, Assistant Special Prosecutor
Also in Attendance:	Andra Oakes

[79] *SAN CLEMENTE, CALIFORNIA, FRIDAY, JULY 25, 1975, 1:00 p.m.*

THE NOTARY: Mr. Nixon, this is a continuation of your deposition that was commenced this morning, and you have been previously duly sworn, and you are still under oath.

MR. NIXON: I understand.

RICHARD M. NIXON,
plaintiff herein, and having been previously first duly sworn, testifies further as follows:

FURTHER EXAMINATION BY MR. DOBROVIR:

Q. Mr. Nixon, when you were in the Office of the President of the United States, did you have an aide by the name of Gordon Strachan, S-t-r-a-c-h-a-n? A. He was an assistant to Mr. Haldeman and would be one of my assistants.

Q. He was one of your assistants? A. Yes.

Q. And were you aware that Mr. Strachan was preparing political matters memorandums for Mr. Haldeman? A. Oh, he did prepare political memoranda; yes.

Q. And you were aware of that at the time that he was preparing them? A. Yes, I was aware that he was working on political matters.

Q. All right. Was that part of his official duties as a member of the White House Staff?

[80] MR. MORTENSON: Counsel, are you using the term "official" in the context as it was defined earlier in this deposition, as it pertains to constitutional or statutory obligations or are you using it in a different context?

MR. DOBROVIR: I will strike the word official from the question.

BY MR. DOBROVIR:

Q. Was that part of his duty as a member of the White House Staff? A. During the election campaign members of the White House Staff, when it does not conflict with their primary responsibility on official matters, have been traditional and were in my administration assisting in campaign activities.

Q. So that do you therefore claim the political matters memoranda that Mr. Strachan prepared, as part of your presidential materials? A. Yes.

Q. I am going to show you, Mr. Nixon, a pamphlet, it is the Statement of Information, Appendix IV, Committee on the Judiciary, House of Representatives, 93rd Congress, Second Session, pursuant to House Resolution 803, Political Matters Memoranda, September 18, 1972. And there are included in here some nineteen separate documents. I would like to ask you if you would look at these documents, please, and tell me which ones you personally had seen earlier. A. I can't recall.

MR. MORTENSON: What pages, Counsel?

[81] MR. DOBROVIR: I am asking the witness to look

at everything and tell me if he can recall which of those he has seen earlier.

THE WITNESS: I can't recall.

MR. DOBROVIR: All right.

THE WITNESS: In a quick perusal of the documents, and I haven't – I mean it takes a little time to read it all, it does not show my initials on them. Normally when I looked at a document when it came to my attention either it had my initials or a check mark. These were documents that Mr. Strachan and – I see Mr. Haldeman's initials and his notes throughout.

BY MR. DOBROVIR:

Q. Now, in seeking exclusive control over disclosure of those documents, which of the interests that we earlier discussed are you seeking to protect?

MR. MORTENSON: Counsel, you have given the witness here a book of, as you have described them, nineteen documents and if you propose that we spend three or four or five hours necessary to review in detail the nineteen documents covering, I don't even know how many papers, and to line by line, which is necessary to determine which interests are being protected, I don't think that it is reasonable to request that time be spent here. I think that the record reflects that plaintiff is claiming those as part of the presidential materials and that the pleadings in this case reflect the interests to be protected as challenged to the suit.

THE WITNESS: 151 pages.

[82] Mr. DOBROVIR: All right.

MR. MORTENSON: I think the record should also reflect, since those are matters of public knowledge at this point, that plaintiff does not seek to maintain the exclusive right to control disclosure thereof.

MR. DOBROVIR: I will show you, Mr. Nixon, a one-page document called Memorandum for H. R. Haldeman

from Gordon Strachan on White House stationery. And I would like the reporter to mark this as Intervenor Defendants' Exhibit A.

THE NOTARY: The one-page document handed to me by counsel, consisting of a memorandum for H. R. Haldeman from Gordon Strachan, dated May 11, 1971, subject Timmons' Investigation of San Diego as 1972 Convention Site, will be marked Defendants' in Intervention Exhibit A, to the deposition, for identification.

BY MR. DOBROVIR:

Q. My first question is: Have you ever seen that particular document before? A. I can't recall having seen the document. I can recall discussion of the substance of the document.

Q. All right. Now, do you claim that document to be, or the original of that document to be part of your presidential materials? A. Yes, I do.

Q. What is the basis for that claim?

MR. MORTENSON: I object on the legal conclusion basis. The claims are set forth in the pleadings in this case.

[83] MR. DOBRIVIR: Is the basis for your claim that that is a matter of personal privacy?

MR. MORTENSON: I object to the question on the ground just stated.

MR. DOBROVIR: The witness has stated in his Affidavit and earlier in the course of this deposition has defined where it is personal and private. I don't think that those are legal conclusions. If, however, you instruct the witness –

MR. MORTENSON: You have not asked him whether he considers this a political document. You have asked whether he claims this and what interests it is to protect.

MR. DOBROVIR: I just asked him if that is, that document is a personal or private document.

MR. MORTENSON: I didn't hear that question. But that is a question I think he can respond to.

THE WITNESS: It is not personal nor private.

BY MR. DOBROVIR:

Q. That is political? A. Yes.

Q. Does that document have anything to do with the performance of your official duties as President? A. As what?

Q. As President? A. No.

MR. DOBROVIR: Now, this will be Defendants' Exhibit next in order.

THE WITNESS: If I might interject here, for purposes of [84] clarification of perhaps Counsel's line of questioning, that as we pointed out throughout this suit and pleadings and the Affidavit and like the President of the United States traditionally serves in many capacities, his primary responsibility, of course, is what has been termed official. He is Commander in Chief of the Armed Services and he has constitutional duties. Another hat the President wears is that of being the leader of his political party and, of course, connected therewith is the President's own personal political activities that he may be engaged in. For example, when he is running for reelection. Then in addition to that a President also is a citizen with personal contacts and private contacts. He is also a family man and if he has children, a father as well as a husband.

This is in the category of what we would call political information and I claim that that is part of it. I claim it is part of the subject matter of this suit.

THE NOTARY: The document handed to me by counsel, consisting of 124 pages listing names and contributions, will be marked Defendant Intervenor's Exhibit B, to the deposition, for identification.

BY MR. DOBROVIR:

Q. Exhibit B is a list of names and numbers which is described in another lawsuit by a witness as a list of campaign contributors that was maintained by Rose Mary Woods.

The first question is: Have you ever seen this document?

A. I do not recall having seen the document. It is [85] possible that I, however, could have seen the list of names because it was Miss Woods' function, among many other functions, to, after the campaign, because I had no contact when I could possibly avoid it with contributors, after the campaign election it was her function to set up various events where I could express my appreication. In that connection I might have seen this document. My best recollection, however, is what I saw was a list of names which we had for dinners, receptions, et cetera, et cetera, which covered most of the major political contributors and some who didn't contribute very much.

Q. Did you instruct her to maintain that list?

MR. MORTENSON: Objection. That calls for the substance of discussions between plaintiff and members of his staff, which we claim as privileged in the suit.

MR. DOBROVIR: I am not asking, Mr. Mortenson, if there was a tape of such instructions.

MR. MORTENSON: I know you did not ask that.

I will object to that question or any other question that calls for the substance of plaintiff's conversation with members of his staff.

BY MR. DOBROVIR:

Q. Was that document prepared by her in the course of her duties as your secretary or maintained by her if it wasn't prepared by her in the course of her duties as secretary? A. Yes. She, like other members of the staff did, whatever was within her ability to work on the cam-

paign, where that did not interfere with her primary responsibility to do work [86] involving official responsibilities with my official responsibilities as President.

MR. DOBROVIR: Would you mark this, please.

THE NOTARY: The six-page document handed to me by counsel, consisting of a memorandum dated April 23, 1969, from Richard G. Kleindienst, Deputy Attorney General, to John Ehrlichman, Counsel to the President, Re: ITT-Canteen Merger, will be marked Defendants in Intervention Exhibit C, to the deposition, for identification.

BY MR. DOBROVIR:

Q. Now, Mr. Nixon, I am showing you a memorandum from Richard Kleindienst and Richard W. McLaren to John Ehrlichman titled ITT-Canteen Merger. And my first question is: Have you ever seen that document before? A. I have no recollection of ever seeing it.

Q. Now, is that document claimed by you as part of the presidential materials involved in this lawsuit? A. Well, to the extent in view of this line of questioning, that memoranda are prepared and sent to members of the White House Staff from the Executive Agencies, or a member of the White House Staff to a member of the White House Staff, to the extent that those have traditionally been considered to be the presidential material, I claim that this is presidential material. And it has been the case in the past, as I understand.

MR. DOBROVIR: I am showing you a memorandum dated July 20, 1971, for Bud Krogh from John Dean. I will ask the reporter to mark it.

[87]THE NOTARY: The ten-page document handed to me by counsel, consisting of a memorandum for Bud Krogh from John Dean dated July 20, 1971, with attachments, will be marked Defendants in Intervention Exhibit D to the deposition, for identification.

MR. MORTENSON: Counsel, I am going to ask what the source of these documents are? Are they documents that came from the White House files? Were they produced from other sources? Because the Complaint here encompasses the materials that have been impounded under Court Order, as part of the materials of the Nixon Administration.

To the extent that these are not documents that are included among those materials which did not originate from those sources, it is impossible for us to make a determination of whether they are encompassed by this litigation.

MR. DOBROVIR: All of the documents which I have are documents which I understand are copies of documents that are in the presidential materials that were subpoenaed either by the Special Prosecutor's Office and turned over to the Special Prosecutor's Office by the White House during the incumbency of Mr. Nixon or were subpoenaed by the House Judiciary Committee and were turned over to the House Judiciary Committee during the incumbency of Mr. Nixon.

MR. MORTENSON: Is there anything in the record which indicates that the original, or at least the carbon copy from which you have obtained a carbon copy of the memorandum marked, I believe it is, Defendants' in Intervention C, came from the White House files as opposed to the files of the Deputy Attorney [88] General?

If there is no basis other than your assumption, it is impossible for the plaintiff to speak with any assurance as to whether or not that is a document to which we claim ownership under this litigation.

MR. DOBROVIR: I cannot say with assurance, of course, where reposes the original from which that copy was made.

MR. MORTENSON: Well, if that is the case, I have no way of knowing whether or not John Ehrlichman received this document and placed it in his files, or received this document and returned it to the Deputy Attorney General. I have no basis for knowing whether this document is included in the presidential materials and therefore it is impossible for me to permit the witness here to speculate as to whether or not that document is a document which is claimed under this litigation.

BY MR. DOBROVIR:

Q. Do you have before you the Krogh-Dean memorandum? A. Yes.

Q. That is Exhibit D.

Have you ever seen that document before?

A. No, I can't recall having seen it.

Q. Do you claim the original of that document as part of your presidential materials involved in the lawsuit?

MR. MORTENSON: Again, Counsel, I have to interrupt to say that that is a document, whether the original reposes in the presidential materials that are now impounded as part of this lawsuit. That will influence the answer.

[89] MR. DOBROVIR: I believe it is.

MR. MORTENSON: Well, if you have a basis for that I will accept the basis for your belief. And with that we can answer your question. If you are assuming that it is, all we can do is assume that if it were there we might take a position one way or the other.

MR. DOBROVIR: Perhaps I can ask the question hypothetically.

BY MR. DOBROVIR:

Q. If the original of that document still is in the White House, would you claim it as part of your presidential materials? A. Yes.

Q. Yes? A. This is distinguished from the document Mr. Mortenson was referring to earlier, communication within the White House itself.

Q. Thank you.

Is that a personal or private document?

A. This document?

Q. Yes.

MR. MILLER: To whom, Counsel?

MR. DOBROVIR: To Mr. Nixon as defined by him earlier today.

MR. MORTENSON: Are you talking about the first page, Counsel?

MR. DOBROVIR: The entire document.

[90] THE WITNESS: It would depend after a very quick perusal, of a very long document, for context.

BY MR. DOBROVIR:

Q. Why don't you focus on the very first page and have the testimony reflect only as to the first page.

(At this time plaintiff and plaintiff's counsel confer.)

THE WITNESS: I would consider this primarily a political document.

BY MR. DOBROVIR:

Q. That is primarily a political document.

Is there any other aspect to it that relates as to why you would claim this as part of the presidential materials?

A. Well, it was obviously not written, the memorandum, for the private purposes of Mr. Dean or Mr. Krogh, it related to general policy of the Administration. I would consider it to be political, a political document and within the claim that we are making in this suit.

Q. Does it relate at all to their official functions as members of the President's staff? A. Without knowing the background I couldn't say.

MR. DOBROVIR: Would you mark this, please.

THE NOTARY: The four-page document handed to me by counsel, consisting of a memorandum from George Bell dated June 24, 1971, for John Dean, Jerry Warren and Van Shumway entitled Subject: Opponents List, will be marked Defendants' in Intervention Exhibit E, to the deposition, for identification.

[91] BY MR. DOBROVIR:

Q. Have you ever seen that document before? A. I have no recollection of having seen it; no.

Q. Were you aware, at the time of the preparation of that document, that a list of twenty opponents was being prepared by Mr. Bell? A. By Mr. Bell?

Q. Or by anyone in your staff? A. I can answer the question only in a broader sense, that in campaigns there is always the custom to determine those who are supporters in the various areas that might affect the outcome of a campaign, in the business world, political world and needless to say, we, of course, not only prepared – there were prepared, certainly for the campaign organization, not only a document of this sort but also a document indicating those who were not supporters. We have both.

Q. Excuse me? A. We have both.

Q. Yes. Was that document prepared by Mr. Bell in the course of the performance of his duties as a member of your staff? A. As I have pointed out before, a staff member of any public elected official who is running for re-election can and almost invariably does, to the extent that it does not interfere with his primary responsibility in official government business, work during a campaign for the success of whomever is his superior.

Q. Now, is that the kind of document disclosure of [92] which would have a chilling effect on advice to be given to you by members of your staff in the future or by members of a President's staff to a President in the future? A. It very well might; yes.

Q. In what way? Can you expand on that? A. Because the fact that the individuals who are named in the document were considered by a staff member to be opponents of the Administration, may or may not have been individuals – as a matter of fact, on the other side of the coin, individuals who were listed as supporters might have been concerned about being so listed. And in view of the fact that it would inhibit their opportunity to change their minds the next time around, which many people do. And I would say therefore that this type of document is one that could well inhibit their freedom of action. Well, if you want to put it, freedom of expression and association and so forth in the future. I am referring to people that are named.

Q. Excuse me? A. I am referring to people that are named, I said.

MR. DOBROVIR: We will mark this as Exhibit F.

THE NOTARY: The three-page document handed to me by counsel, consisting of a transcript of September 15, 1972, meeting will be marked Defendants' in Intervention Exhibit F, to the deposition, for identification.

BY MR. DOBROVIR:

Q. This is an exhibit which is a copy of Pages 614 through 616 of Book 2 of the Statement of Information of the [93] House Judiciary Committee pursuant to House Resolution 803. This consists of a portion of the transcript of the September 15th, 1972, meeting, a portion of the transcript of a tape recording of such a meeting.

I would like you to focus in particular on the portion at the bottom of Page 614, which is ascribed to President and from there on down through to the bottom of Page 616, the words "That's right" are ascribed to Dean.

I would like to ask you first if you recall that conversation?

A. Oh, I recall having a conversation; yes.

MR. MORTENSON: Which portion did you direct him to look at?

MR. DOBROVIR: Starting at the bottom of the first page where it says "President" and then about eight or nine lines and then the rest of it to the bottom of the last page where it says "Dean: That's right."

MR. MORTENSON: Counsel, is this the entire transcript of the entire conversation?

MR. DOBROVIR: Of course not, counsel.

MR. MORTENSON: Do you have the entire transcript?

MR. DOBROVIR: I do not.

MR. MORTENSON: What is your question?

MR. DOBROVIR: First of all, does the witness remember the conversation that I have designated?

MR. MORTENSON: The portion of the conversation that you have designated?

MR. DOBROVIR: That is right.

[94] THE WITNESS: I can recall it in general, not specifically.

BY MR. DOBROVIR:

Q. Now, is that conversation claimed by you, is the tape recording of that conversation claimed by you as part of the presidential material involved in the lawsuit?

MR. MORTENSON: Counsel, we have stipulated that every one of the White House tape recordings and everything contained thereon is a part of the presidential materials claimed under the statute.

MR. DOBROVIR: Fine.

BY MR. DOBROVIR:

Q. Is that conversation, do you consider that conversation personal and private?

MR. MORTENSON: Unless Counsel can produce the entire transcript so the witness can evaluate that portion

of the conversation, Counsel, in light of the entire conversation, I don't think the witness can respond.

MR. DOBROVIR: Very well.

BY MR. DOBROVIR:

Q. I have here a pamphlet entitled Transcript of the Eight Recorded Presidential Conversations September 15. This is a printed version rather than a typewritten version, which is the document I have handed you, and it covers from Pages 1 through 19. A. Yes.

[95] MR. DOBROVIR: Would you like me to show that to the witness, Mr. Mortenson?

MR. MILLER: The entire conversation?

MR. DOBROVIR: Yes.

MR. MORTENSON: If you have it.

MR. DOBROVIR: It is the transcript of that entire tape as published by the House of Representatives.

MR. MORTENSON: Counsel, do you know who prepared the transcript?

MR. DOBROVIR: I believe that the record shows that that transcript was prepared by the staff of the House of Representatives.

MR. MORTENSON: Then we can't vouch for the accuracy and I am not prepared to have the witness speculate as to whether something is personal, private or official.

The material that I see here on the first page, Page 614, is marked "unintelligible," and that conversation, that portion which was unintelligible to whomever transcribed this for the House Judiciary Committee, may very well be a private reference or political reference or official reference. And for this witness to speculate as to what this conversation is or what this portion of the conversation is without having the recording to review it is impossible and I will direct him not to answer.

MR. DOBROVIR: You are challenging the authen-

ticity of the House of Representatives transcript?

MR. MORTENSON: What I am saying, we have no basis to establish the authenticity.

[96] Mr. DOBROVIR: Are you familiar with the new Federal Rules of Evidence, Mr. Mortenson?

MR. MORTENSON: Maybe you can read them to me.

MR. DOBROVIR: I don't have them with me but they do provide that official documents of the United States are evidence in their published printed form.

MR. MORTENSON: I am not sure that is an official document of the United States. It is a Congressional document. If you want –

MR. DOBROVIR: You are challenging the authenticity of that pamphlet as an official publication of the House Judiciary Committee?

MR. MORTENSON: I am saying it very well may be a document of the House Judiciary Committee, but if you are asking this witness to speculate or to draw a conclusion as to whether that conversation is personal, private, or official, the only way he is prepared to do that is to review the recording, to hear the conversation and make the determination and not to base that speculation on a document prepared by the House Judiciary Committee.

I have no basis to know whether it is an official document or not, to know that portion marked "unintelligible" is in fact unintelligible. It may have been unintelligible to the person who prepared the transcript but it may not be unintelligible to the witness, which would directly influence whether he could respond to your question.

THE WITNESS: A very good example of that occurred when during the course of the tortuous proceedings the story appeared [97] in major newspapers to the effect that on a conversation with Mr. Dean, a taped conversation on February 28th, that he had said, had told me that, according to the transcript, Judge Sirica was a very,

in effect, tough judge and that I responded by saying "He is a gol' darn Wap." That was not only printed in the New York Times, it was on television and on radio. It was never adequately retracted.

What the tape actually was when I listened to it, because I recall, I knew that I had never used that term, I knew I didn't have that opinion. What the tape actually said when Dean said "He is a tough judge," was that "That is the kind I want."

Now, I am not indicating that the individual, whether Special Prosecutor's Office, because here, whether the leak came from there or the House Judiciary Committee, I don't know, I am not indicating that it was done deliberately, but I am indicating that these tapes, having listened to a few and particularly those where conversations run together, these tapes in many cases are heard in different ways and the transcripts therefore may not reflect accurately what was said.

BY MR. DOBROVIR:

Q. Now, let's see if perhaps we can resolve this.

In connection with this conversation, Mr. Nixon, do you remember the reference to Edward Bennet Williams, which the House of Representatives Judiciary Committee Transcript indicates you made?

A. Yes. Yes, I remember a reference to him.

[98] Q. You do remember that? A. I don't –

Q. You do not remember? I am sorry. A. I said I remember a reference to Edward Bennett Williams.

Q. Thank you, sir.

Now, Mr. Nixon, I am showing you once again the blue volume, the "Submission of Recorded Presidential Conversations to the Committee on the Judiciary," which was issued in your name on April 30, 1974. And I am showing you the pages that correspond to those pages and you will notice that the reference to Edward Bennett Williams does not appear there.

A. Yes, I note that.

Q. All right. Now, on April 29, when you made your speech to the nation, did you say: "For many days now I have spent many hours of my own time personally reviewing these materials and personally deciding questions of relevancy"? A. Yes.

Q. Had you personally reviewed the transcript of the September 15 tape for the purposes of the submission of April 30?

MR. MORTENSON: Objection. As irrelevant and I will direct the witness not to answer unless you can explain to me the relevancy.

MR. DOBROVIR: Well, there are two matters of relevance, Mr. Mortenson. One is you have been challenging the authenticity of the House of Representatives transcript.

MR. MORTENSON: I did not challenge the authenticity. I [99] said portions of that, are indicated as unintelligible, and I am saying that I don't know whether that is unintelligible or not, the portions that are written may very well be intelligible.

MR. DOBROVIR: Can we stipulate, Mr. Mortenson, I am not asking the witness about that portion?

MR. MORTENSON: What you have asked is whether this conversation was political, private or official. And I told you unless we have the recording he is not in a position to characterize a conversation or a portion of the conversation. A lot of factors go into characterizing a particular conversation, some of which pertain to conversations that took place before that conversation or after that conversation. We don't have those, we don't have the tape recordings.

BY MR. DOBROVIR:

Q. Would any interest in confidentiality be damaged by the disclosure of your reference to Edward Bennett

Williams in that conversation?

MR. MORTENSON: I object to that, Counsel. We have contended in this lawsuit that the statute provides for the total review of these recordings by a group of government personnel and we have contended that that is a breach which would have a damaging effect upon the Office of the President and upon plaintiff in the suit.

To my mind it is irrelevant and totally immaterial whether a particular revelation as to Edward Bennett Williams would have a damaging impact. This litigation is about a statute [100] which requires the total disclosure of such materials. If the statute provided for the disclosure of all reference to Edward Bennett Williams, that alone we would be challenging, deciding whether to challenge the statute on that basis.

MR. DOBROVIR: Are you instructing your witness not to answer?

MR. MORTENSON: Yes.

MR. DOBROVIR: Are you accepting that instruction, Mr. Nixon?

THE WITNESS: Yes.

BY MR. DOBROVIR:

Q. Very well.

Mr. Nixon, did you personally approve the deletion of the reference to Edward Bennett Williams from the text of the transcript as published in the blue volume I have before you?

MR. MORTENSON: I object on the grounds of relevancy and instruct the witness not to answer.

MR. DOBROVIR: Let me explain for the record, what additional relevance it has then.

MR. MORTENSON: All right.

MR. DOBROVIR: You have claimed in your Complaint that this statute is in effect a Bill of Attainder; that Mr. Nixon is in violation of the Constitution and being

treated differently from all other Presidents. It is our defense to that claim that Congress had ample justification for its action in seeking to place and retain control of the materials at issue here within the [101] Federal governmental establishment. One of those grounds was that when the plaintiff was in control of these materials he issued them in a deleted and changed form. I am now pursuing the line of examination intended to obtain evidence in respect to that issue raised in your Complaint.

MR. MORTENSON: I still disagree with the relevance and instruct the witness not to answer and state that if that is the justification of the statute you have a real problem, because Congress did not limit itself to material relative to Watergate, or those which were turned over, and whether they were turned over in complete form or not. And if you recall, Counsel, at the time these materials were turned over to the House, in the form of the Blue Book, the Committee, the ranking committee members were invited to come and listen to the recordings in their entirety. I don't believe that they deemed it necessary from their vantage point to do so.

BY MR. DOBROVIR:

Q. Mr. Nixon, on May 22, 1974, you wrote to Mr. Rodino, the Chairman of the House Judiciary Committee, and I quote from your letter: "The committee has the full story of Watergate insofar as it relates to presidential knowledge and presidential actions. Production of these additional conversations would merely prolong the discovery without yielding significant additional evidence."

On June 9, once again you wrote to Chairman Rodino and said, "The voluminous body of materials that the committee already has and which I have voluntarily provided, [102] apparently in response to the committee requests and apparently in an effort to round out the

record, does give the full story of Watergate insofar as it relates to presidential knowledge and presidential actions."

On August 5, 1974, in a public statement you said: "On April 29, in announcing my decision to make public the original set of White House transcripts, I stated that 'As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these materials together with those already made available will tell it all.' Shortly after that, in May, I made a preliminary review of some of the sixty-four taped conversations subpoenaed by the Special Prosecutor. Among the conversations I listened to at that time were two of June 23."

My question is: Had you listened to the tape of June 23 prior to writing the letter of May 22, 1974, to Chairman Rodino?

MR. MORTENSON: Objection on the ground of relevance and I will instruct the witness not to answer.

BY MR. DOBROVIR:

Q. Had you listened to the tape of June 23 prior to the letter of June 9 to Chairman Rodino?

MR. MORTENSON: The same objection. I will instruct the witness not to answer.

MR. DOBROVIR: Mr. Mortenson, I have just received a suggestion from one of my co-counsel and I will adopt the suggestion.

[103] My question to you is: Are you claiming that it is irrelevant for the purposes of this lawsuit whether or not Mr. Nixon, in any of those published statements, misrepresented the record deliberately?

MR. MORTENSON: Are you asking the question of whether he misrepresented the record deliberately?

MR. DOBROVIR: I am asking you whether it is your contention that is what is irrelevant?

MR. MORTENSON: Yes.

MR. DOBROVIR: Thank you. Bear with me for a moment and I will find Mr. Nixon's affidavit again.

BY MR. DOBROVIR:

Q. On Page 5, Paragraph 8 of your Affidavit, you state, and I quote–

MR. MORTENSON: If I may, Counsel. Let me expand upon my answer.

MR. DOBROVIR: Certainly.

MR. MORTENSON: But I do believe that it is totally irrelevant to this suit and the issues raised by the statute.

The plaintiff's actions in regard to the preparation of the tape recordings that were reported, the transcript which was reported to the committee, and it is that entire line of questioning that I have instructed the witness not to respond to.

I have informed you, as I am sure you are probably aware, that the full text of those recordings, the actual recordings themselves, were offered to members of the committee to respond to and I think that in itself is a complete [104] demonstration that there was no effort to misrepresent the record, deliberately or otherwise, when the committee to whom the material was submitted had the source available. Beyond that and even in that regard I consider the whole line of questioning irrelevant to this lawsuit.

MR. DOBROVIR: Since we are putting material on the record you should note that my last question related to the June 23 tape which was not offered to the Judiciary Committee on April 30 in connection with the submission. Moreover, that my questions relate to public statements made to the people of the United States and, of course, Section 104-A1 of the statute relates to the desire of the Congress and the President that the full story of Watergate be made public to the people as soon as reasonably possible.

I should add that I am not going to burden the record with it.

MR. DOBROVIR: I was also planning to ask similar questions with respect to the President's news conference of October 5, 1972, as compared with the June 23, 1972, conversation – excuse me, the March 6th, 1974 news conference as compared with a March 22, 1972, conversation, the particular portion of which was not disclosed in the April 30 submission.

I had a question with respect to the news conference of August 22, 1973, and I had a question with respect to the news conference of September 5, 1973.

As I said, I won't ask the questions merely for purpose of having you interpose your objection. I will assume you will interpose for the same.

[105] MR. MORTENSON: I will object and particularly to the extent that you request plaintiff to respond to what action he had taken, whether he had reviewed recordings and in the process of reviewing recordings and in the process of reviewing recordings I imagine there must have been discussions and so forth. The actions of the President are claimed in this suit to be privileged, at least in the context of a Congressional act trying to seize for public disclosure the presidential materials. And to the extent that you were requesting this witness to put upon the record in this case the substance of his actions or discussions or anything else we object on the ground that this is what the whole lawsuit is about, protecting that privilege of confidentiality as well as other privileges involved in the claim.

MR. DOBROVIR: Are you contending then that the matter of the date upon which the plaintiff reviewed a particular tape, which he has disclosed he reviewed in May, are you contending that any more specific information other than that is privileged?

MR. MORTENSON: I am saying in the context of this lawsuit we refuse to answer on both grounds, irrelevancy

and privilege.

MR. DOBROVIR: You are instructing the witness not to answer?

MR. MORTENSON: Yes.

MR. DOBROVIR: And the witness is accepting that instruction?

THE WITNESS: Yes.

MR. DOBROVIR: Thank you.

[106] BY MR. DOBROVIR:

Q. Mr. Nixon, on Page 5 of your Affidavit, Paragraph 8, you state "I assumed that such opinions were given in confidence to assist me as President and that they would not be publicly disclosed. Just as important, those who gave me their opinions must have so assumed."

On Page 14, Paragraph 20, you say with respect to Foreign Affairs and Domestic Policy, "If the President and his advisors had thought that their discussions were to be published and publicized, they would undoubtedly have been far more cautious and far less frank and free-wheeling."

On Page 16 you say at the time the tape recordings were made, and I am not quoting there but now I am beginning to quote "And my other presidential materials were generated, neither I nor the members of my staff expected that any of my presidential materials, and certainly not the tape recordings of my confidential conversations, would ever be disclosed to the public, at least without my express authorization."

However, you also say in Paragraph 22, that you knew that many Presidents had used their presidential materials to prepare their memoirs.

You also say, in Paragraph 23, that in part the consideration of preparation of your memoirs, and I think you testified to this earlier as well, was one of the bases, one of the reasons for the installation of the tape recording

capacity. You also say that you intended to place the tapes in a presidential library.

Now, hearing all those various statements and [107] bearing all those statements in mind, is it your contention in this case that disclosure would not have the chilling effect that you refer to if that disclosure is controlled by you?

A. That is correct. That has also been the practice of previous presidents.

For example, as Counsel is perhaps aware, not only do we have the restriction of fifty years, which President Johnson has placed on his tape recordings, many types of some of the material which Truman had and has never been disclosed and may never be disclosed, the same can be said with regard to President Eisenhower. And what I am doing here is adopting the same practice.

I will, however, as I have indicated, follow as generous a rule as possible with regard to the disclosure. But on the other hand, only the President, with regard to presidential materials, generally I am referring now when they are a combination of official, political, private and personal, only the President can make that judgment with all of the considerations in mind. That I think is the essence of basically this suit as I have pointed out earlier. It has many considerations, but when in trying to determine such matters as whether something should be disclosed or not, the time that it can be disclosed, only one who participated, for example, in a conversation or one for whom the material was prepared, knows the total background and cannot make that decision. It can be adequately made and, as a matter of fact, with no bad intentions whatever or bad faith, it would not be adequately made by government men, bureaucrats.

[108] That is why, for example, I know that President Johnson, and I am sure President Johnson has not allowed review of his tapes except by himself and one

intimate member of his staff. That is why, as I understand, President Kennedy, or as far as the tapes in the Kennedy Library, it's my understanding they are not being reviewed by scholars outside of the immediate Kennedy entourage.

That is why President Eisenhower, I know, insisted on reviewing his materials. He did not have tapes but he always had a notetaker in his room or virtually always. And if only one individual was present, he would ask that individual to make a memoir for his presidential files. President Eisenhower felt it his prerogative and responsibility. And upon his death he passed that on to his son to make the decision as to what should be disclosed and when.

All that we are seeking in this suit is that same right, because we believe that the right is not simply a pecuniary one, because memoirs might be more valuable because of the fact that the President had access or at least the first access to materials, but in my view it goes much further than that. It goes to the Office of the Presidency, not just the man who sits there, but for past Presidents and I believe future Presidents as well. Some may disagree, some Presidents may disagree, but I know from my experience that the safeguard of confidentiality of privileged communications is indispensable to making the best decisions and if that safeguard is further eroded, it already has been eroded too much in my opinion, but if it is further eroded it will have a very detrimental effect [109] on the ability of future presidents to make the decisions that need to be made for the best interest of the country.

Q. In that connection I would like to read to you a passage from the Transcript of Eight Recorded Presidential Conversations Hearing before the Committee on the Judiciary, pursuant to House Resolution 803.

It appears on Page 183 of that volume, and also in a

separate volume entitled Comparison of White House and Judiciary Committee Transcripts of Eight Recorded Presidential Conversations. The House Judiciary Committee states with respect to the material from which I am about to quote, it states as follows: "The following portion at the end of the March 22, 1973, conversation (beginning on Page 180 of the House Judiciary Committee Transcripts) does not appear in the "Submission of recorded presidential conversations April 30, 1974, nor does it appear in the transcript prepared by the White House for the Special Prosecutor."

"In January of 1974 and to the Judiciary Committee in March 1974, and I am reading from Page 183 and it says – let me go back a little bit so it is in context.

President: "Dean? Discipline is very high. Mitchell, Parkinson, O'Brien.

President: Yes. Dean says it's great. Well, you know I feel for all the people. You know, I mean everybody that is involved. Hell, "all we're doing is their best to [unintelligible] and so forth." And then again unintelligible. "That is why I can't let you go down. John? It has already come–

[110] "Dean. Uh.

"President: Did you find out anything?

"Dean: I was – I went over to Ziegler's office. They have an office over there. But O'Brien'll be down here in a little while to see you. I am going over to Ziegler's office to finish this up.

"Mitchell: Are you coming back?

"Dean: Yes, I'll come back over here then.

"Mitchell: Okay.

"President: Yes. Well, when you come back, he can, uh, is that office open for John now?

"President: Then he can go over there as soon [unintelligible] This – but, uh – one thing I don't want to know – now, let me make this clear. I, I, I thought

it was very – a very cruel thing as it turned out – although at the time. [Unintelligible] What happened to Adams I don't want to happen with the Watergate matter. I think he made a mistake, but he shouldn't have been sacked, he shouldn't have been – and for that reason, I am perfectly willing and I don't give a" – I am just deleting an expletive "what happens. I want you to all stonewall it and complete them, complete the five amendments, save the plan. That is the whole point. On the other hand, uh, uh, I would prefer, as I said to you, that you do it the other way."

A. Would counsel please indicate what "the other way" was.

Q. I am reading from the transcript. [111] A. Well, Counsel–

Q. I don't know. A. I would interpose here, Counsel, the fact that that is a rather famous conversation that appeared on the cover of Newsweek and the cover of Newsweek left off what Counsel has just read. I would prefer it "the other way." The other way that I preferred, as I had indicated, was that all should go before the Grand Jury and testify freely without claiming any privilege.

Q. I am reading the whole page, Mr. Nixon. A. I know, but you didn't read the other way, the other way referred to earlier in the paper. You don't even know what the other way was.

Q. No.

MR. MORTENSON: I think it is representative of the fact, Counsel, that when you start to take portions of the conversation it distorts the meaning.

THE WITNESS: You don't know what the other way is.

MR. DOBROVIR: No. Would you tell us.

MR. MORTENSON: He just told you, Counsel.

THE WITNESS: I just told you. It seems to me when asking, when you say "the other way" you would have looked back and found what it was I think. It was in reference to going before the Grand Jury. That had constantly been my position.

MR. MORTENSON: Can I ask you, Counsel,–

MR. DOBROVIR: I was going to ask a question about that, if I may.

MR. MORTENSON: Go ahead.

[112] BY MR. DOBROVIR:

Q. Mr. Nixon, did you approve the deletion of that passage from the submission of April 30, 1974 – January '74 and March 1974?

MR. MORTENSON: Objection on the ground he has already stated, and I would like for Counsel to state for the record where in his pleading the accuracy of plaintiff's, or as he stated it before, the deliberate misrepresentation of any record is raised in your pleadings. You said you raised this as a defense to–

MR. DOBROVIR: That is not what I stated, Mr. Mortenson. It is a defense and it will be argued as a defense.

MR. MORTENSON: Has it been raised in any of the pleadings?

MR. DOBROVIR: It is implied in our denial of the allegations made in your Complaint.

MR. MORTENSON: Point to where it is implied in that.

MR. DOBROVIR: In other words, your allegation that this is a Bill of Attainder.

MR. DOBROVIR: Pursuant to that, we have a right to produce evidence in support of our denial.

Let me ask my question, may I?

BY MR. DOBROVIR:

Q. Mr. Nixon, what interest would be damaged – well, let me ask it this way.

What interest was damaged by the disclosure of that conversation?

MR. MORTENSON: I object and will instruct the witness not [113] to answer this whole line of questioning.

MR. DOBROVIR: I will now turn it over to Mr. Krulwich.

MR. MORTENSON: Let us take a brief recess, please.

(A brief recess is taken at this time.)

MR. MORTENSON: Let me state for the record that as counsel for plaintiff we object to the procedure of the joint Intervenor Defendants splitting the questioning of this witness in the deposition, on the grounds that the Court has permitted a joint intervention by the parties. The normal procedure for taking the testimony of a witness is one attorney for one witness. But under the circumstances we are glad to consent to the parties going ahead and splitting it in this instance.

THE WITNESS: I am an American League fan. I don't mind.

MR. KRULWICH: Let me say for the record, we have conducted the deposition on joint effort and we have cooperated in the preparation. We will not be asking repetitious questions. We have divided up responsibility for questioning and we think it is appropriate.

EXAMINATION BY MR. KRULWICH:

Q. Mr. Nixon, my name is Andrew Krulwich and we are counsel for The Reporters Committee for Freedom of the Press and the American Historical Association and American Political Science Association. I am accompanied here by Mark J. Spooner and Leonard B. Simon.

Did you conduct governmental business at Key Biscayne and San Clemente when you were President?

A. Yes.

[114] Q. Did you maintain or keep any files relating to this governmental business in Key Biscayne or San

Clemente, while you were President? A. No.

Q. Were any tape recordings made in Key Biscayne or San Clemente, when you were President? A. No.

Q. When you left the White House on August 9, did you take with you any documents or tapes? A. What tapes are you referring to?

Q. The tapes that you referred to in your Affidavit and which is the subject of this litigation. A. Do you mean the so-called tapes from the Watergate tapes?

Q. Tapes made in the Executive Office Building? A. The ones made under the taping system?

Q. Yes. A. No.

Q. Did you take with you any documents? A. Any documents?

Q. Yes. A. What type of documents?

Q. Any documents that would be referred to and you would consider as part of the presidential materials, when you left the White House on August 9. A. None of that sort. Presidential material?

Q. Yes. A. No.

[115] Q. In connection with your preparation– A. Let me point out.

Q. Sure. A. I requested, of course, that as soon as I arrived there that the tapes and all of the presidential material be forwarded here. But as a result of a number of events that go on, in particular the temporary restraining order that was obtained and that is why I did not have them. If I had thought such an order would have been issued, I think I might have taken them.

Q. In preparation for your possible testimony in the Watergate Conspiracy trial, did you receive any of the presidential materials of your Administration in order to assist you in preparing that testimony?

MR. MORTENSON: Counsel, are you referring to copies of the presidential materials?

MR. KRULWICH: Either copies or materials, taking

them one at a time.

THE WITNESS: Excuse me. What testimony do you mean? The deposition that I gave?

BY MR. KRULWICH:

Q. No, I am referring to there was a time when there was a possibility that you might testify in the Watergate Conspiracy trial in Washington, D.C. A. Yes.

Q. Did you receive any of the presidential materials of your Administration in order to assist you in preparing for [116] possible testimony at that trial?

(At this time plaintiff and plaintiff's counsel confer.)

THE WITNESS: We are consulting with Counsel to find out, because at that time, as you remember, I was in the hospital.

MR. MILLER: You may testify you don't recall.

THE WITNESS: Actually I was in the hospital for approximately two months and I don't recall any material ever being sent to me. But my Counsel informs me they got some material and did not send it to me, because I was in the hospital.

MR. MILLER: I didn't inform you.

THE WITNESS: I said that is my recollection. I can't tell you whether we did or not. As far as I am concerned, I didn't see any, let's put it that way.

BY MR. KRULWICH:

Q. And if any was sent you you do not know about it? A. I do not know about it; no.

Q. Since August 9, have you received any presidential materials from your Administration, either originals or copies? A. Presidential material?

Q. Yes. A. All of that material is presidential, I said. As you know, all the presidential material is held in Washington.

Q. Mr. Nixon, I want to show you an article that appeared very recently in the Washington Post, possibly to refresh your recollection and just for your information and so you know what it is I am referring to. A. Who is the author?

[117] Q. I don't know. It doesn't say. It indicates that the Saturday Evening Post may be getting some of your presidential papers from your daughter, Mrs. Eisenhower. And my question is first: Is this accurate? A. Let me see what my daughter is up to.

MR. MORTENSON: Another example of inaccurate Washington Post reporting.

THE WITNESS: This article refers to letters that were received, incidentally, primarily during the period I was in the hospital.

My daughter Julie, as you know, has been a consultant and I think called an assistant editor of the Saturday Evening Post. When she was here, oh, three, four months ago she came over and worked with volunteers in opening some of these letters and she was particularly interested in the letters that came from children. You know, school children made up cards and all that sort of thing during my illness as well as others. And she said that she would like to do an article on this. And so under those circumstances she contacted our office and these, incidentally, were letters that had already been opened. They were letters that I could not respond to because no allowance, no adequate allowance was provided for responding to over two million letters I received since August 9th. And some of these letters were sent to the Post, to Indianapolis.

However, while they were in transit she concluded that she could not and did not want to go forward with the project. As a matter of fact, she has other plans for the future, not that she won't be a consultant to the Saturday [118] Evening Post. Consequently the letters are

now on their way back and I am donating them all to the presidential library to be set up.

Q. Time Magazine reporting on the same incident, and I am sorry I don't have a copy of the Time article with me, referred to these papers as "presidential papers." A. No.

Q. Is that accurate? A. I would say not – well, it is accurate only in the sense that if a Time editor believes that a former President's letters sent to him are presidential, then it is a presidential paper. I do not, however, consider it to be accurate in terms of presidential papers, in terms of this lawsuit, and I believe they are holding quite a few letters, a number that came in before I left.

MR. MORTENSON: I think the record should be clear that the testimony is that none of these letters referred to in plaintiff's testimony predate August 9, 1974.

THE WITNESS: Correct.

MR. MORTENSON: And I certainly hope no one claims they should be the owners of them.

BY MR. KRULWICH:

Q. I was trying to establish what papers they were. A. I understand. And the stories, because of lack of information, would lead you to that conclusion, so your line of questioning is fair and proper.

Q. I want to go back for one minute. I neglected to [119] follow up before, when I asked about the materials you took with you when you left the White House on August 9th.

You answered that, I believe, you did not take with you any White House tapes. Did you take any other tapes with you?

A. All that I was able to take with me and all that I did take with me were some of my personal notes and diaries that had not yet gone to the White House files. Those, of course, I took with me because they were avail-

able, they were in the office and I just took them from my office. But only things that were in my office or in my safe at the White House residence were taken.

Q. Are you referring there to Dictabelts? A. There were some.

Q. Are these the same Dictabelts that you are referring to in your Affidavit on Page 12? A. A portion of them. Most of the Dictabelts, unfortunately I must say in terms of my commitment to meet a deadline with regard to writing, are still in the White House under the Restraining Order. The only ones I was able to take with me and that I did take were ones that were in my office and, as I said, in the President's Office and also in my safe in the White House residence, where I kept notes, Dictabelts whenever they had recently been made.

See, it was my custom, I should point out, that with regard to Dictabelts, not to have them transcribed and they have not been transcribed yet so I don't even know what I have.

[120] Q. I see. A. And we have not been able to get an inventory from the White House as to which of the belts are there.

THE WITNESS: Is that right, Mr. Mortenson?

MR. MORTENSON: Yes.

BY MR. KRULWICH:

Q. You just mentioned your commitments for writing. Do you have a commitment at this time? A. Yes.

Q. And does that commitment involve a signed contract with a publishing agency? A. Yes.

Q. And does that signed contract provide for you to receive a sum of money in return for your memoirs? A. Yes. It is conditioned also on what I am able to produce, and I confidently expect that I will be able to produce memoirs in due time.

Q. All right. On Page 16 of your Affidavit, and again on Page 17 in Paragraph 21 and then again Paragraph 23, you referred to "Tape recordings of conversations in the Oval Office and my office in the Executive Office Building and elsewhere," et cetera. A. Yes.

Q. What did you mean by "elsewhere"? A. Well, there were tape recordings of my telephone conversations made from my office in Camp David, what is called Aspen Lodge. There were no tape recordings in San [121] Clemente and none in Florida or on the telephone or in the office. There was a tape recording of telephone calls made from Aspen Lodge, that is what I was referring to "elsewhere."

Q. Do the tape recordings that you just described plus the tape recordings in the Oval Office and the tape recordings in your office in the Executive Office Building constitute the totality of the tape recordings that you are claiming as presidential materials in this litigation? A. Well, let me explain. You did not mention telephone. The telephone in the Lincoln Sitting Room was recorded, none other. That was the one I used as an office in the residence. No other telephones in the residence were recorded.

The telephones both in the EOB and the Oval Office were recorded. The Cabinet Room also I don't think you mentioned, that was recorded. Beyond that, as far as tape recordings were concerned, there were none, as I said. And I say this only based upon what I have been told and what I have understood.

I understand that during the Johnson Period there were tape recording systems that covered telephones of members of the staff, and whether that is true or not I am unable to say. I have understood that, but I want the record to be clear here that there were none of the telephones of members of the staff that were recorded, as far as I was concerned. I have no knowledge of that. What

they may have done you would have to ask them.

Q. Were any of your conversations with foreign heads of state or foreign governmental officials, when you traveled [122] abroad, tape recorded? A. Oh, by them always.

Q. By you? A. Never.

Q. On Page 12 of your Affidavit, in Paragraph 19, you give as an example what you term your wife's personal files, "her record pertaining to the White House restoration project which was funded entirely by private contributions and which she voluntarily initiated and supervised."

Is the list of those, as to who contributed to the White House restoration project, a document that you claim as one of your presidential materials in this lawsuit?

A. Yes. Well, I don't know whether we want to quibble about it. It belongs to my wife in that instance, but my wife intended to give all of her papers – she has already expressed that intent to me – all of her papers to the White House and – could I elaborate a moment with regard to that? This may anticipate the question.

Q. Yes. A. I have indicated, for example, that I consider total privilege, and I am sure all counsel would agree with this, any conversations that I have had, private conversations, with my wife, my daughters, my sons-in-law, other members of my family. However, I had a number of official, what I would consider official conversations with my wife and with my daughters. For example, my wife took three good will trips abroad, two to Latin America and one to Africa and I had extended conversations with her in the office and the Oval Office concerning these [123] trips.

She also was the leader, in terms of a program very close to my heart and hers as a former teacher, that is The Right to Read Program. And I had many conversations with her on that program.

The White House restoration project has already been mentioned. The other programs, in which both she and my daughters were involved, was the Legacy of Parks Project. I was unable often to do the dedications and so forth and therefore any conversations in that area were involved.

Both of my daughters worked at varying times as volunteers with retarded and underprivileged children from Washington and I had conversations with them about those projects.

What I am indicating is very simply that my wife and my daughters were very active in those areas. Also I should point out that in addition to what we would call simply official or official family activities, that they were active in the campaigns. They would make campaign appearances and I would discuss that. So they were engaged in political activities. So when I speak not just of the privilege but when I say conversations with my wife and daughters would never be disclosed, I would say that any conversation that I would apply the same guidelines to her and I have discussed this with her as with my daughters that I applied to myself.

Q. Thank you.

Mr. Nixon, is the Gift Register, which was prepared by the White House Gift Unit listing gifts presented to you or [124] family by foreign heads of state or officials of foreign governments among the presidential materials that you claim in the case? Are you familiar with the Gift Register?

A. I know the Gift Record Unit, because the individual in charge of that said that Mrs. Nixon had been most scrupulous. She was not commenting upon any others in terms of reporting all gifts and turning all gifts in, of course, and having them recorded so that they could eventually be delivered to a library.

Now, if you are referring to the gifts themselves, it

would be my intent that they should be put in the library as they are in other libraries, the Johnson Library, the Truman Library, and the rest, particularly the State gifts as well as some from private citizens here in this country. But if you are talking about the lists, I don't quite know what you are talking about.

MR. MORTENSON: Counsel, if I might interrupt. There has been described in the Nixon v. Sampson matter, of which you are counsel of record, the official register of gifts, under the Foreign Gifts Act, or whatever it is called, have been turned over to the Department of State, which is the repository of that registration and therefore not included along with the presidential materials, beyond that material which has been introduced in that case. And because the Register does reside in the State Department, according to that testimony, it obviously is not included in the presidential materials claimed by this lawsuit.

THE WITNESS: Let the record show, however, in view of [125] some of the things that have been written by some of the reporters, for whom I have, of course, great respect, and probably because of lack of information, that every state gift received during the period I was President of the United States by me or by my wife has not only been recorded but also will be donated to the library. None have been sold and none have been appropriated. All stories to the effect of that are to the contrary and totally inaccurate.

MR. KRULWICH: Thank you, Mr. Nixon. I have no further questions.

EXAMINATION BY MR. GOLDBLOOM:

Q. Mr. Nixon, I am Irwin Goldbloom and I have with me David Anderson. We represent the Defendants United States and General Services Administration.

I would like to go back briefly over some of the ground that you covered this morning about the scope

and nature of the presidential materials.

A. I didn't get that.

Q. The scope and nature of the presidential – A. Oh, the scope. I see.

Q. I believe you indicated that in your Affidavit that in many instances there are letters written to the President by citizens concerning matters of national or domestic affairs, such as circumstances involving Lieuteneant Calley; is that correct? A. Oh, yes.

Q. Isn't it fair to say that the White House receives [126] thousands upon thousands of letters on a regular basis daily from citizens around the country on all matters or many matters of national concern? A. Yes.

Q. Is there in the White House a unit that is designed to prepare responses to these letters from citizens or others who have communicated with the President? A. Yes.

Q. And for the most part unless there might be an unusual circumstance, most of these letters would not come directly to the President's attention; is that correct? A. One moment. That may have been the case and may be the case with some Presidents but not with me. I had prepared for me on a weekly basis a summary of the mail, the issue breakdown, the number of letters received on one side or the other. In addition to that I wanted to see a sampling of mail that had been received, for example the Calley Matter and wherever the letters involved a major issue it became necessary then to prepare an adequate response. And I took personal responsibility for preparing that response. Of course, staff members would submit their versions, but I believe I found that in many years of public life people who received letters from the President, you would get them framed. I don't mean my editorial ability was much greater than those in the writing section, but I did a great deal of it myself. And so I saw a considerable amount of mail.

I should also point out in that connection that a great many, a great number of letters were written to Mrs. Nixon, [127] to which she responded personally.

Q. To some extent some of this mail that was directed to the President may have been sent or delegated to the various departments, agencies for response in the event that it referred to a particular matter. And in that instance the White House may have received a copy of the response that was sent by the answering agency or department. Is that a correct understanding? A. Correct.

Q. Now, I believe you said this morning that approximately, as an estimate, two hundred thousand of the 42 million estimated number of documents may have come to your attention at one time or another while you were President. A. Just a rough estimate.

Q. Is it fair to say that if a matter was brought to your attention it had some relative importance as compared say with the documents that didn't come to your attention? A. Of course.

Q. Now, in connection with the papers in which your immediate staff members prepared for you or for each other in connection with matters that you had to act upon, is it correct to say that these matters touched upon some of the most sensitive issues regarding this country? A. We are talking now about papers or letters or both?

Q. Papers. We are talking about memoranda or papers which were brought to your attention. A. Yes.

MR. MORTENSON: Let me ask Counsel to clarify what he means by "sensitive matters."

[128] THE WITNESS: Are you referring to basically national security matters only?

MR. GOLDBLOOM: No, but that would be included.

THE WITNESS: What else would be sensitive?

MR. GOLDBLOOM: Defense in particular and economic policy.

THE WITNESS: Do you include that as sensitive?

MR. GOLDBLOOM: I was using that in terms of national security.

THE WITNESS: As you are quite aware, matters in that area, you are talking about classification, and you don't use top secret classification or something in the economic field. It is only used in a national security field. I am not trying to quibble, but I just want to be sure I understand the question.

MR. GOLDBLOOM: I didn't intend to use the term sensitive in any classification.

THE WITNESS: I see.

MR. GOLDBLOOM: But rather –

THE WITNESS: Important.

MR. GOLDBLOOM: – important to the country.

THE WITNESS: All right.

BY MR. GOLDBLOOM:

Q. This would include national security and foreign affairs matters? A. Yes.

Q. And matters involving the administration of laws, the execution of laws by the President, and matters of economic policy, domestic – [129] A. Yes.

Q. I believe you testified that the taping system that we have referred to was originally installed for national security, particularly for national security purposes.

MR. MORTENSON: I don't believe that accurately reflects the testimony given.

THE WITNESS: What I believe I testified to, and this will save the reporter going back to have to read his notes, was this: That the question which was raised as to whether or not the taping system recorded was primarily for purposes of writing my memoirs.

I pointed out that President Johnson had mentioned that particular factor in recommending that one be put in. I said as far as I was concerned I considered it important from the standpoint of making the historical

record, having in mind also certainly as a subsidiary, but not then the most compelling reason, the possibility that sometime in the future I might do some writing and that having available the tapes would be helpful in seeing that it was accurate. I pointed out that as far as I was concerned, too, that I was particularly interested in the national security area but I did not limit it to that because there are other areas which I have also indicated, the matter of Welfare reform, the desegregation issue, the issues which seemed so miniscule but are so important. Some like abortion, et cetera. All of these, of course, are on tape.

BY MR. GOLDBLOOM:

Q. Mr. Nixon, I am going to read from a portion of a press conference that you gave on August 22, 1973. A portion of [130] your answer, which appears on Page 1018 of Presidential Documents, weekly compilation of Presidential Documents, for Monday, August 27, 1973. And I quote: "It was put into place" – this is referring to the tape – "It was put into place again in June of 1970 (1971) because my advisors felt it was important in terms, particularly of national security affairs, to have a record for future years that would be an accurate one but a record which would only be disclosed at the discretion of the President or according to directives that he would set forth." Do you recall making this statement? A. Yes. I was wrong, incidentally, about the date. I thought it had been put in earlier than that. I was wrong. It did not go into place until February, as I recall, of 1971.

Q. Is it important in national security affairs to have a precise record of our dealings with foreign countries, foreign leaders? A. It is very important.

Q. Is that because our position in foreign affairs depends upon sensitive and important negotiations with foreign leaders of foreign countries? A. Yes, sir.

Q. Is it fair to say that contained – A. Just a second.

(At this time the plaintiff and plaintiff's counsel confer out of the hearing of the reporter.)

THE WITNESS: I am sorry. Let the record so indicate I consulted with Counsel on a legal matter.

[131] BY MR. GOLDBLOOM:

Q. Is it fair to say that included, among the presidential documents and in particular the tapes, are matters relating to national security and foreign affairs which might not be found elsewhere in government documents or records? A. I would say that that would be, if you know the operations of the White House National Security Staff in our Administration and the current Administration, I assume, that that would not constitute a significant problem, because my relations with Secretary Kissinger and the head of the National Security Council were so close in an official way that there was nothing that he did and nothing that I did or said in our conversations with foreign leaders that we did not report. So as far as anything that occurred during the meetings that I have had abroad or at home, whether they were taped or not taped, they weren't taped abroad, of course, and at home despite my usual – my desire to have one-on-one meetings from time to time, it was more often the custom for both sides to have a notetaker. So in the files of the National Security Council, I believe Dr. Kissinger is still there as well as being Secretary of State, are all relevant materials that President Ford would need and for that matter a future President might need. And I am sure that continuity would be continued.

Q. You are saying that Dr. Kissinger has access to your presidential materials insofar as they relate to national security and foreign affairs matters?

(At this time the plaintiff and plaintiff's counsel [132] confer outside the hearing of the reporter.)

MR. MORTENSON: Mr. Reporter, would you repeat the question.

(The pending question is read by the reporter, as requested by counsel.)

THE WITNESS: No. Anyway, my answer may have been confusing. Dr. Kissinger has his own file and I have my presidential files. Dr. Kissinger's files are complete and all materials that have to do with our negotiations with Russia, with Chou En-lai, with Mao Tse-tung, with Sadat, needless to say the European and Latin American leaders, ad infinitum, all those materials are in the files of the National Security Council.

As far as my particular files are concerned, where the matters were specifically dealt with by me or where there was a meeting that I had, of course I have my own copy. A pretty good example of that is the controversies over the famous Thieu letters. As soon as that controversy arose, the first I heard about it was when I read in the paper a statement by Mr. Nessen, the Press Secretary, that a review of the Thieu letters indicated that "they were on all fours" or at least consistent with the statements that I had made publicly about any communications with Mr. Thieu.

The point I am making is that I gave no authority to Dr. Kissinger to go into my files. And he didn't go in my files. He didn't have to, he had them.

Q. Well, to the extent that Dr. Kissinger may not have had access in his files in the National Security Council, do you [133] know whether he has had access to presidential materials for the conduct of his current functions?

MR. MORTENSON: I object to the question. I think that Counsel for the government is aware of the procedures that have been set up for access by the NSC members to the presidential materials and records and in what instances they have not had access, and that is ade-

quate basis and is the best evidence of such access.

MR. GOLDBLOOM: I don't know that that is the best evidence nor do I know that it is necessarily precluded from being the subject of this deposition.

One of the contentions of the plaintiff is the right of dominion and control over presidential materials and I think it is important to explore the amount of access or the nature of access on certain types of documents.

MR. MORTENSON: Well, excuse me, Counsel. To the extent that you are focusing on what access has occurred since President Nixon resigned from office, and particularly since the imposition of the Court Order which prevents his access, except under specified conditions, but which permits with notification to counsel the review of materials for ongoing government purposes, that that information is best obtained from members of the NSC who have had the direct access, not by plaintiff some three thousand miles away who has not had access.

MR. GOLDBLOOM: You are willing to stipulate that there has been access to presidential materials.

MR. MORTENSON: I can't stipulate if members of the NSC have had access, I assume they have.

[134] THE WITNESS: Do they?

MR. MORTENSON: I don't have the NSC records.

THE WITNESS: Let me say this. Knowing Dr. Kissinger, everything that is in the presidential files he has a copy of. I can't say the contrary however.

BY MR. GOLDBLOOM:

Q. Mr. Nixon, if there is a reason to maintain an accurate record of presidential activity in the area of foreign affairs and national security, isn't it true that that reason for an accurate record is to enable a President exercising Constitutional powers to know precisely the matters relating to national security in foreign affairs for his exercise of his powers? A. Well, wouldn't it be better

if I answered that question by example and then I can be very precise.

When I became President I succeeded President Johnson who was, of course, a member of the other party. However, despite the fact that we had been opponents in the campaign, we developed on a parallel basis at all levels for consultation and briefings. Rusk briefed Rogers; Rostow briefed Kissinger; Johnson briefed me in great detail. Also following, after coming into office, due to the fact that the Vietnam War negotiations, you know, they had the bombing halt just before the elections, and negotiations were still in process, Dr. Kissinger on several occasions met Mr. Helms on several occasions at my direction, and General Haig talked to the President, went down to see President Johnson and Mr. Rostow [135] to see what the status of the negotiations had been and where they should go. And they had absolutely no problem at all. And Secretary Rogers, in his relationships with Secretary of State Rusk, had no problem.

I may say, too, looking back over the hisotry of this country, that even when one party succeeds another that we have become mature enough that this kind of communication, between Presidents particularly, is now standard and should be. As far as I am concerned there is, of course, as you would assume, no problem as far as cooperating with President Ford and there will be no problem as far as cooperating with a future President in the event Mr. Ford is not the President, as long as I am alive.

Q. In other words, our foreign policy involves continuity? A. Yes.

Q. And the President in this regard is more than a person, he is an institution in a sense. Is that fair to say? A. No, I think you can't say that the President is just an institution or for that matter because each President is different. Each President develops his own policies. Some

want to start with an absolutely clean slate and they sweep out all of their predecessors'. They don't want anything to do with any of the previous policies.

There are instances when it is necessary for a President to have communication with a former President. For example, President Kennedy had several communications with President Eisenhower, when he thought it was necessary, and [136] there was cooperation.

Q. That is our experience in modern times. A. It is and it will continue to be now, particularly will be in my case, because of my knowledge of the necessity for continuity.

But I wish to point out, if I could, to Counsel, that that continuity need not be obtained and should not be obtained at the cost of destroying the principle of confidentiality. You have to weigh – we have problems to weigh and I have already talked about my strong feelings with regards to the necessity to maintain the principle of confidentiality and separation of powers.

I should point out that we can have both. We can have or maintain the principle of confidentiality and that means the President should retain control over his papers and so forth. But at the same time that is not inconsistent with maintaining continuity. That has not been the case in the past and we have not had a serious problem in recent years and to my knowledge we have not now and I don't see any coming up in the future. Certainly in view of the fact that this legislation deals only with my presidency, there is no chance whatever that that will happen.

Q. Could the principle of continuity be destroyed or undermined by concepts of private property of a former President? A. That would assume that a former President was irresponsible and put his own views about the materials that were presidential materials, his own views with regard to his right thereto above the interest of the country. And despite [137] differences we may have as to who should occupy that office, I can think of no man

in either party that would do that at the present time. And incidentally, that would include about forty people that are now running for President or Vice President.

Q. I believe you made some reference this morning, Mr. Nixon, to classified documents and the interests of a former President in abiding the rules and regulations and the outstanding executive orders concerning the use of dissemination of classified materials. A. Correct.

Q. Do you agree that a former President, with respect to his presidential materials, must so abide by executive regulation authorities concerning the use of and dissemination of classified materials? A. I not only agree with it but I have – again we can get to a precise example.

Shortly after President Johnson left office, when he had started writing his memoirs, he called me not once but almost every couple of months asking for more archivists who had the experience and the qualifications to declassify materials, so that he could use it in his memoirs. In other words, he knew that he could not use and should not use classified materials in his memoirs. That was his practice, that was President Eisenhower's practice and I am sure it would have been President Kennedy's had he lived. It certainly was President Truman's practice and naturally would be mine.

As I said, President Johnson assumed that he could not use a classified document unless he got permission. Here, [138] when we talk about documents or presidential materials, I should say, and in the national security area, they are imbued with a public trust, they are different from what you have described earlier as being sensitive in the domestic area. And where those materials are concerned, where they are imbued with a public trust, then no former President, even though he has control thereof as to their disposition, no former President should disclose them or for that matter maintain them unless or except with the consent of or an understanding with the incumbent President.

(At this time the plaintiff and plaintiff's counsel confer out of the hearing of the reporter.)

BY MR. GOLDBLOOM:

Q. Moving on to a slightly different subject.

In Paragraph 5 of your Affidavit, on Page 3, you indicate various different roles that the President serves as "Chief Executive but is a major force in foreign affairs, a formulator of domestic policy, a leader of his political party, a politician in his own behalf, a private citizen with personal friends and associates, and a husband and father to his family."

I believe this morning you indicated with respect to documents that may relate to – well, that are included among presidential documents –

A. Presidential material.

Q. – presidential material there is an intermixture of these roles and that in some instances where the President is acting as Chief Executive he is also acting in a political [139] sense, particularly where he is faced with a Congress of a different political party. A. Even when he has a party of his own. Mr. Roosevelt learned that after 1938, as you recall.

Q. In a sense, isn't it fair to say that in many respects the various roles of the President are contained throughout most of his activities, the roles that you have indicated in Paragraph 5, and that no one role is sharply defined in terms of his activities? A. Are you suggesting, if I get the question, that the roles are intermingled in conversations?

Q. Well, I am asking you whether or not they are not in fact intermingled in fact.

For example, the President taking action in an official capacity under his constitutional or perhaps statutory powers might properly take into account political considerations concerning Congress in taking action. Is that correct?

A. Yes, he must.

Q. The President is a leader of the people and in a sense his personal health is a matter of public concern. So to the extent that matters that one might consider to be quite personal to the average citizen might also be matters that would be effected with public interest. Would that be fair to say?

MR. MORTENSON: Let me ask, Counsel. Are you saying members of the public would be interested in learning the President's health? Are you saying they have an interest in knowing what the President says to his doctor?

MR. GOLDBLOOM: No. I am saying they are, or I am asking [140] whether it is fair to assume that the members of the public are interested in knowing what the President's health is.

THE WITNESS: Oh, yes. Yes. And I mean this is growing out, as we know, of the rather tragic experience of President Wilson, who for fourteen months was unable to really serve in the office. And the tragic experience of Franklin D. Roosevelt, perhaps that is questionable, but some believe that he had health problems in the end.

But it has been customary in recent years, particularly after President Eisenhower's serious illnesses, for reports to be made publicly with regard to the annual physical examinations. I have had those reports made. On the other hand, I distinguish those reports from conversations that I have with my doctor and I have both with regard to how I feel and what I ought to do about my health to make it better or how to preserve it or what have you.

BY MR. GOLDBLOOM:

Q. Now, in connection with the development of the taping system, the installation of it by the Secret Service. Do you know whether there were any instances when references were made, and I say this prior to any public controversy concerning the existence of the tapes, whether they were ever used for any governmental pur-

pose? A. No. To my knowledge no tape was ever transcribed. And as far as I know, none was ever listened to until this controversy began.

Q. Do you know whether the Secret Service agents who [141] operated the system had the capability of listening to the tapes? A. Yes. It is my understanding that the Secret Service agents who operated the system did have the capability of listening to the tapes. I have no knowledge that they ever did.

Q. The installation of the taping system, was that financed by the government? A. I understand it was. Both the Johnson and Nixon Administrations it was a government project and I understand the Kennedy Administration as well was financed by the government.

MR. GOLDBLOOM: I have no further questions.

MR. MORTENSON: Off the record.

(A brief recess is taken at this time.)

MR. GELLER: Mr. Nixon, my name is Kenneth Geller and I am the attorney with the Watergate Special Prosecution Force.

As you may know, the Special Prosecutor intervened in the civil action last January in order to protect our interests in certain of the presidential materials of your Administration, which were relevant to our ongoing investigations and prosecutions and from the outset our interests in this lawsuit has been limited.

As you may also know or as you are certainly aware, several months ago procedures were instituted between our office and counsel representing you by which the Special Prosecutor has been given access to certain of the materials which we requested in order to carry out our responsibilities.

The Special Prosecutor believes that we have [142] received good faith compliance with substantially all of our requests up to this time and we expect to have full compliance in the near future, at which point we intend

to withdraw from the lawsuit.

My understanding, by the way, is that there are still is relatively few outstanding requests at this time for materials.

Finally, it is our understanding that the accommodation which we worked out with your counsel is an ongoing one and that if we have any future requests for material the procedures which we have instituted in the past will again be followed to carry out those requests.

Having explained the posture of the Special Prosecutor in this lawsuit, I believe that the few questions I intended to ask were covered by counsel for the Justice Department and therefore I have no questions.

MR. MORTENSON: Off the record.

(Discussion, off the record.)

MR. MORTENSON: It has been agreed among counsel for the plaintiff and the government defendants and the joint Intervenor Defendants that plaintiff's Affidavit, which has formed the basis for some of the questioning during this deposition and which has been submitted in this litigation shall constitute the direct testimony of the plaintiff and shall be admitted as such subject to appropriate objections by parties seeking to interpose them and that the questioning by the joint Intervenor Defendants and the government defendants taken today shall constitute the cross-examination, again subject to any appropriate objections on the admissibility of [143] the evidence or the testimony elicited.

MR. DOBROVIR: With one further proviso. Of course, subject to the fact that we do not waive any rights we may have with respect to those questions that the witness was instructed not to answer and did not answer.

MR. MORTENSON: All right. I don't ask you to waive anything.

MR. DOBROVIR: Thank you.

MR. MORTENSON: Now, Mr. President, let me backtrack over a couple of the areas of questioning.

EXAMINATION BY MR. MORTENSON:

Q. Did you prepare speeches which you intended to deliver during the time you occupied the Office of the President? A. Yes.

Q. Did any of those speeches, which you prepared, relate to political matters as opposed to matters official in character? A. Oh, yes.

Q. Did you personally prepare these? A. I spent more personal time on them, as I have indicated earlier, than most recent Presidents. But I had excellent assistance from members of my staff. When it came down, however, to the major thrust, the theme, the final editing, I have very strong feelings about that and take responsibility for any grammatical errors.

Q. Were portions of any of these speeches prepared by you personally without the assistance of any members of the [144] staff? A. I would say that more than half was prepared by me personally.

Let me, if I could, explain how I went about preparing a speech. We are all a little different, you know. All of you are lawyers, I guess. I take the yellow pad and I sit down before seeing anything from any of my associates on any major speech, like an inaugural, or State of the Union, or report to the nation on what is going on in Vietnam or China or something like that, and make very extensive notes maybe on eight or ten pages. After I had made those notes I would then call in the individual, normally it would be Mr. Price, sometimes Mr. Buchanan, who was going to work on the speech, and run over the notes with him and ask him, with the help of others on the speech writing – in the speech writing group, to prepare a draft. The draft would come back and, of course, would always be much too long. I then would cut it back. And because the speech writers obviously would have some ideas to stimulate my own thinking, I would prepare other sections to go into the speech. At the same

time, in following this process one goes through and it is an agony of trying to create a speech, to get the ideas down on paper and to get the written word so that it can flow into the spoken word. Many extraneous ideas come to mind and what I would do in this instance would be either to write out again on yellow pad or to dictate on the Dictabelt extraneous ideas not to be included in the speech but to be used later. I would say over a period of five and a half years, and perhaps some of the better speeches were never [145] made. I have, oh, at least several hundred pages, fifty thousand to one hundred thousand words of speech ideas, writing ideas that I intended to use at a later time. Whether it is precedent thereafter,... For example, and I won't belabor this any longer, but I thought it might be interesting to our group of visitors here, when I wrote the article for Foreign Affairs in 1967 on the opening to China, it didn't create much stir except among sophisticates who read Foreign Affairs.

After the opening occurred, I did a great deal of thinking about what the future of the world would be fifteen to twenty years from now when the Chinese, already the most populous nation in the world, would then have a very significant nuclear capability and in addition be a very significant economic power in the world, how this would affect not only the United States but our relations, the relations of the United States with Japan and Southeast Asia and the Soviet Union in particular and, of course, with Western Europe and the so-called Third World.

I recall this, for example, as one of the very extensive monographs that I have written. It is in my presidential papers. It is in what you call the China Folder.

The announcement of going to China, as you recall, was two minutes. What I wrote before boiling it down to two minutes was one hundred pages.

Q. In that regard, do you intend in the future to write on matters of foreign affairs and domestic policy? A. Yes.

Q. Do you intend or did you intend, at the time the materials that you have just described were generated, to [146] utilize these materials either as they presently exist or in some revised form to formulate the basis for your writings on matters of foreign affairs and domestic policy? A. Yes. As a matter of fact, I would label them "Speech Material," or "Book Material."

Q. Has any of this material been published? A. No.

Q. Or delivered in a public forum, to your knowledge? A. No. And as a matter of fact, this material I would put in the file and would not give to my speech writers, not that I was trying to keep anything from them. I didn't want to divert them from what I eventually determined would be the theme.

Q. Now, in your proposed writings on matters of foreign affairs and domestic policy, how would that be affected if all of the materials within your files, which you had previously generated, were made public? A. It would be worthless.

Q. Would it influence your ability to write on these issues? A. Oh, I could still write on them but it would perhaps – oh, I am not an expert on what would be newsworthy and what would not be materially newsworthy. What is particularly important in my view is that these are thoughts that I had. I am not sure in all cases that I will come down exactly the same way, because the world is changing so much today. But these are thoughts that I have had in the field of foreign policy and some in domestic policy, as well, which I hope to [147] enunciate. Frankly I hoped to in my second term. And once I complete my first volume of my memoirs I would hope to write in this area. These are areas and these I should point out are primarily in foreign affairs, very little in the political area.

Q. Do they include political matters? A. Oh, yes. Yes, I had some ideas with regard to, for example, the two party structure in this country; with regard to the retirement or, shall we say, the age limits for members of the House, Senate, Court and et cetera, et cetera. Some that were even more novel, that I have not yet determined will be included in an article or speech but that might well be.

Q. Were these materials that you have just described left in the White House at the time you resigned on August 9th? A. They were.

Q. During your term in office, – A. Let me point out. They were left because I had mentioned earlier that I, of course, had some materials in my office, but these would be in my speech files because the thought which brought this forth was generated there.

Q. You, during your term in office, were you aware of any prior Presidents' practice with regard to the use of their presidential materials in the preparation of their memoirs? A. Oh, yes, I was quite aware of that. I read most of them.

Q. Did you ever discuss with President Johnson the concept of private ownership of the presidential materials? A. I think it would be more proper to say he discussed with me vehemently.

[148] Q. Would you describe that conversation. A. Well, as a matter of fact I had two conversations with him. He suggested, when I called on him at the White House between the election and the inauguration, that I should give my vice presidential papers to the government. I hadn't thought of it before and I don't know why I wasn't aware of the Act. And I followed his advice and did make a gift of the vice presidential papers to the government, as I think it has been reported to a certain extent.

A year later, and I believe it was late, very late in the year, as a matter of fact just before Christmas of 1969,

President Johnson came in to see me and we had breakfast. And as you know, he was a man of many moods, but he could sometimes have a towering rage and in this instance that rage was directed against what he called the Williams Amendment, which I recollect was an amendment which removed or revoked that portion of the law which allowed gifts of public papers to be deducted for tax purposes. And President Johnson said to me, he said, "Now, in view of that fact," he said, "Just remember your papers are yours." And he said, "Don't you ever give them to the government, because they are not going to let you deduct them. That is going to have a bad effect on all people inthe future. Libraries are going to dry up. Those papers are yours. You should leave them to your children."

I didn't follow his advice. Nevertheless he did indicate his view.

Q. Despite his advice, do you intend to place your presidential papers in a presidential library? [149] A. I not only intend to place my presidential papers, but my vice presidential and my congressional and my senatorial papers as well as a considerable amount of papers that were accumulated during the years I was out of office.

Q. You have stated in your Affidavit and in testimony given today at the deposition that you engaged in private or personal conversation with members of your family. Did any of these conversations occur in the White House Oval Office or on telephones which were connected to the taping system? A. Well, I must say that most of them occurred on telephones from either the White House, either from the Oval Office or the EOB or the Aspen Lodge, as the case might be. Several occurred in the Oval Office and some in the EOB and, of course, some in the residence where there was no taping system whatever.

Q. If the – A. The number of telephone calls was astronomical, I just say.

Q. If the contents of the recordings made in the White House during your term in office were disclosed, would it have any impact upon your ability to associate with individuals whom you had previously associated with? A. Oh, yes.

Q. Would you explain what impact that would have. A. Well, the discussions that occurred in a President's Office, particularly when the individual who was talking to the President feels that he can talk in confidence, as our Affidavit indicates were, not only free-wheeling but sometimes blunt and [150] sometimes clearly apart from what we would use, we would describe in the narrow way of being personally embarrassing, they would be quite honest in giving their views.

For example, this would be particularly the case where an appointment was being made for the Judiciary or to the Cabinet or to other top government positions. Here are all the files, the raw files of the FBI and letters would come in from various individuals. Members of Congress would either come in or write indicating their pros and cons and so forth and so on. And the individuals who wrote or talked to me, as Mr. Morris Ernst already indicated, would write and talk to me in a very direct way and say things. And if they became public, it would not only be personally embarrassing to them but more likely would make it impossible for me to have a continuing association with them in the future on the basis as I have had in the past. I don't mean by that that the President in the White House listens to and expresses rather derogatory opinions about every individual whose name is up, but in order to make the right kind of appointment, for example, you have got to consider where a lawyer is concerned not only his legal qualifications but his relationships with his family, his personal habits, his reputation in every respect, and all of that of course would be considered before a decision was made.

The same would be true with regard to some of the very controversial political issues, and I mean personal issues that came in. I am sorry, domestic issues as distinguished from foreign policy issues. Needless to say, foreign policy, the enormous division in the country with regard to the war, all of [151] that, it was bluntly discussed and is well known. But the country also has had very, very strong disagreements with regard to such volatile subjects as busing, desegregation, Welfare reform, et cetera. And I have had discussions, for example, with members of Congress, both the House and the Senate, of both parties, some of whom have been my friends going back over twenty-five years, where they thought they were talking in confidence and where if what they said got out it might not only affect what they would feel is their right to express themselves freely in the future, because every man must live with his public statements. He has great enough difficulty doing that. But having to live here with private statements that he thought were off the record would be more difficult. But insofar as I am concerned, of course, it would have a most devastating effect in terms of many of the individuals who talked to me or wrote to me in confidence and then found their confidence has been destroyed.

Q. During your term as President, did you ever find it necessary, either for the effective conduct of foreign affairs or the promotion of domestic policies, to depend or request of President Johnson or of members of his family access to any of his presidential materials? A. I have no recollection of that. When I say that I should point out that as I did in answering your earlier questions here, my relationship with President Johnson, while we were political opponents, my relationship was one that I valued very greatly and was one where at his insistence, not only his insistence but only with his agreement had various [152] contact not only with him by phone but

also at times in person and also by my sending Dr. Kissinger down and Mr. Helms, General Haig, and he was their friend.

Q. And after the time that President Johnson died, in your experience in the office is it your opinion that had President Johnson destroyed his presidential materials, that that fact would have precluded you from conducting an effective foreign policy? A. We could have conducted an effective foreign policy, yes.

Q. Did you have access to presidential materials as part of the conduct of your foreign policy? A. We had access. First we had access to enough material, as a result of our consultation during the transition to go forward, to conduct an effective foreign policy. Also you must realize when President Johnson died, Mr. Rostow is still living and Secretary of State Rusk is living and Mr. McNamara is living and all of them, incidentally, have been extremely cooperative, being of assistance whenever we thought there was a need to go back into the past history in order to be sure we made good history for the future.

Q. Early during this deposition counsel for the Joint Intervenor Defendants read to you a list of government organizations and asked you whether the files of those organizations or the materials generated by them were claimed by you as presidential materials in connection with this litigation. Do you know whether the organizations which were recounted by the Joint Intervenor Defendants' counsel were [153] federal agencies or commissions or what status they were? A. I regret to say I really don't know and I doubt if President Ford knows or President Johnson knew, there are so many. Most of them, incidentally, are useless.

Q. That too. A. I stand with that. Not that people are useless but the product. So I would be unable to say, Mr. Mortenson, in answer to that question, be helpful in answering the question by Mr. Dobrovir, that as far as

these agencies are concerned, whether they were set up by statute or whether they had been set up as a result of an Executive Order or whether they were agenices that might have even been set up on an ad hoc basis without even an Executive Order, you just ask a group of people to report, I would be unable to say.

Q. When a staff member left his position in the Office of the President, are you aware of any instructions to them or any policies which were adopted by your office which would preclude them from taking from their files matters which they deemed to be purely personal? A. No, on the contrary. However, instructions were given to all staff members. Incidentally, that is another recommendation that President Johnson made to me very strongly during the period between the election and the inauguration.

The instructions were given to all staff members as well as Cabinet members that any papers that had to do with relationships with the President, conversations, for example with the Vice President or President or presidential business, should be left in the White House. And, as a matter [154] of fact, President Johnson recommended that his practice after every Cabinet meeting was to have somebody go around the table and pick up every scrap of paper.

Q. Would you describe for us in a bit more detail how conversations with, for example, congressmen, the conversation would relate not solely to matters which you describe as relating to official actions, such as veto of legislation but also to branch into conversation with politics and personal matters. A. To begin with, the fact that the conversations that I had generally with men and some women who were in Congress and the Senate, Margaret Chase Smith, that I had known them for many, many years, so we met on a person-to-person basis.

Second, I found that in dealing not only with members of Congress but also with members outside of government, a business leader, labor leader, educator or religious leader, and the rest, that in order to really plumb his thinking or hers, that it was even more necessary than it is when you are an ordinary citizen, to gain his or her confidence, to make him or her feel comfortable. And so it is what we call warming up the individual so that eventually when he comes to talk about the business that he is there to talk about, that he talks very frankly, with the feeling of confidence. That is why when a congressman or senator or other individual came in or would come in, the conversations were replete with references to family matters or their relations with their colleagues or their own health, their own problems and matters that are basically private in the light of it.

[155] There also, of course, would be innumerable times when political matters would be discussed with both Democrats and Republicans. They would talk about their opponents they might have in the primary or expect to have in the final campaigns and usually in not too complimentary terms.

Q. Are you aware of any official government document, such as a veto message to Congress or an enrolled bill which you signed being maintained among your presidential materials? A. Oh, absolutely not. That goes in the out box and goes to wherever they keep such things.

MR. SPOONER: Mr. Mortenson, when you use the term "such as," what are you including in this term?

MR. MORTENSON: I am including veto messages to Congress, including the appointment of officers of the Army and Navy and Air Force.

THE WITNESS: The Judiciary.

MR. MORTENSON: I am including the signing of enrolled bills and issuance of presidential pardons and any other document reflecting the final action taken pursuant

to a constitutional obligation of the President or those required under statutes.

THE WITNESS: He is limiting it, in other words, to what is required by constitution or statute and distinguishing therefrom those matters that might be, say, a speech you are going to make to the American Legion or something of that sort.

BY MR. MORTENSON:

Q. You have characterized a portion of the presidential materials, which I think at the time you were talking about [156] National Security related materials, as being imbued with the public trust, or at least that was your opinion. Does that opinion encompass other forms of presidential materials? A. Well, when we say imbued with the public trust, that is a phrase that I may have used too loosely or I should say, on the contrary, too precisely, because what I meant in the case of National Security material, that I would consider that a former President is inhibited from the disclosure thereof in making a decision in regard to disclosure thereof before getting permission or permission from whoever is the encumbent President which, of course, was the practice President Johnson followed with me.

Now, with regard to materials that have to do with revenue sharing or the energy programs or matters of that sort in the domestic area, I would not consider that that was material that could not be disclosed without consultation.

Now, as a practical matter, it would be, however, my practice if the issue involved was a hot one, for instance a domestic issue, and was before a present administration and if I had material that I thought might affect it one way or another I would, of course, try to be responsible enough to use that material or not to use it, depending upon what affect it might have on action under present

consideration. But I can think of no examples there.

MR. MORTENSON: I have no further questions.

FURTHER EXAMINATION BY MR. DOBROVIR:

Q. Mr. Nixon, Mr. Mortenson asked you about, if I am not mistaken, whether there were ever any instructions to your [157] staff about how to handle their personal records. Am I recollecting correctly? A. Yes.

MR. MORTENSON: Material that they considered to be personal.

BY MR. DOBROVIR:

Q. All right. In that connection then I would like to ask you if you are familiar with a document that was introduced in the other lawsuit in which you were plaintiff, Nixon v. Sampson, as Nixon Exhibit 8. It is titled "Donation of Personal Papers to the Richard Nixon Library," and at the bottom of it it says "National Archives and Records Service, General Services Administration, November 1972." A. Yes.

MR. DOBROVIR: Would you please mark this.

THE NOTARY: The three-page document handed to me by counsel, titled "Donation of Personal Papers to the Richard Nixon Library," dated November 1972, will be marked Intervenor Defendants' Exhibit G, to the deposition, for identification.

BY MR. DOBROVIR:

Q. My question is: Are you at all familiar with the contents of that document? A. I didn't know we were suing him. Go ahead. What is your specific question?

Q. First of all, are you familiar with it? A. Oh, yes. Yes.

[158] (At this time plaintiff and plaintiff's counsel confer out of the hearing of the reporter.)

THE WITNESS: My counsel informs me that he has prepared it so I must be familiar.

MR. MILLER: I have not informed you.

THE WITNESS: I had thought. I am sorry. I just assumed my counsel tells me everything but apparently he doesn't.

MR. MORTENSON: I think it is important for the record to reflect we may have to go back and pick up the question. I think my question was, Is he aware of any instructions to members of the office of the staff which preclude them from taking with them their personal materials.

THE WITNESS: Personal materials.

MR. DOBROVIR: Fine.

MR. MORTENSON: You are not aware of this?

THE WITNESS: I am not. This one I am afraid I am not aware of.

BY MR. DOBROVIR:

Q. Well, could you examine it and tell me whether this was the policy of your administration, with respect to disposition of files by members of your staff. A. Which paragraph?

Q. The whole thing, please.

(At this time the plaintiff and plaintiff's counsel confer out of the hearing of the reporter.)

THE WITNESS: This reflects my understanding. All right. As a matter of fact, it is personal correspondence of an [159] official that does not directly concern the work of the office and does not intend to be part of the official records. For example, part of a personal file maintained for his own personal use, they must be distinguished from official records.

MR. MORTENSON: I think the record should reflect, though, that while the witness has indicated this is his understanding of the position of his office, that we do not, for purposes of this litigation, adopt in total the verbiage used in the document, such as "official records."

MR. DOBROVIR: Now, this is not a question but I want to make a record of the following statements of Mr. Miller's letter to me of July 22, 1975, in which he says: "Plaintiff's Affidavit and your response to plaintiff's motion for protective order, which in light of the Court's Order of July 16, 1975, should set the parameters for the deposition."

Reflecting the understanding that Mr. Mortenson and I had reached on the telephone the Friday before, I would like to in that connection incorporate Paragraph 5 of the document referred to in that letter, Defendants' opposition to motion for protective order, which states "Finally, plaintiff asserts that he alone, assisted by others of his selection, has the right and thus should have the exclusive opportunity to cull through the materials, to select those that will be made public and those which will never see the light of day (¶ 21, "Certainly not the tape recordings;" ¶ 22,23). He asserts the exclusive right to determine what should be deleted from the tape recordings (¶ 23 at p. 17; see ¶ 24) and "To reserve for *my* own review" materials which "*I* consider" to be private (¶ 26; [160] emphasis added). Plaintiff's assertion of this right of exclusive control raises the issue whether he, as distinguished from other Presidents, should be granted this privilege by a Court of equity; whether on the record he has made he may be entrusted with the power to conceal evidence of his own activities that might reflect most adversely upon him. Only oral examination carries the possibility of eliciting testimony that would inform the trier of fact on this score." And that ends my quotation from that document.

This is in further response, Mr. Mortenson, to your question to me where in the pleadings in the case is stated the defense which I asserted to you as to the grounds for relevancy as to questions which I posed to the witness with respect to the discrepancies between his public state-

ments and the transcribed tests of certain tapes and with respect to material deleted from the transcripts of tapes which were made public. In the light of that, I renew my request that the witness be permitted by you to answer those questions.

MR. MORTENSON: Well, my response, Counsel, is that Paragraph 5 of your motion, or your Opposition to the Motion for Protective Order mischaracterizes grossly in several respects the allegations for or contentions made by the plaintiff in the suit. They speak for themselves and to the extent that you rely upon this to name the issues of this case you are obviously free to do so.

MR. DOBROVIR: I merely wish to point out, Mr. Miller in his letter to me reflected our conversation the Friday before and indicated what was stated in that pleading as well [161] as in the Affidavit sets the parameters for the deposition and you now disagree.

MR. MORTENSON: It clearly reflected what we considered to be the parameters of the deposition. It in no way implied explicitly or implicitly that any question that counsel put which he deemed to fall within the parameters of those are therefore proper. And upon that basis do we object, as well as others.

MR. DOBROVIR: I have nothing further.

FURTHER EXAMINATION BY MR. KRULWICH:

Q. Mr. Nixon, you testified, in answer to a question from Mr. Mortenson, that all documents reflecting your actions, reflecting your constitutional duties as President, were matters of public record. One of your duties under Article 2, Section 3, of the Constitution is to "Take care that the laws be faithfully executed."

Another duty under Article 2, Section 2, is that "The President shall be Commander in Chief of the Army and Navy of the United States."

Will you then agree that all documents or materials reflecting your performance as President, of your duties

to take care that the laws be faithfully executed are to be a matter of public record?

A. Well, that is a matter that has to be determined as has been the case with all previous presidents. It has to be determined when I examine the materials and the documents. As I said, I intend to be as forthcoming as I feel is proper and [162] I think that is repetition of a statement I have previously made on that score.

Q. Just to clarify then. There are in a sense two types of presidential types of constitutional duties. There are those normally represented by official action, such as veto messages, appointments, pardons, material that Mr. Mortenson talked about and others that are under the more general categories of your constitutional duties. The other is to take care that the laws be faithfully executed. Do you agree?

MR. MORTENSON: Counsel, I think it is a legal conclusion. You are asking the witness as to whether materials that are related to the faithful execution of the laws of the United States represent official documents. We have contended in this suit that those which are official are lodged in other branches of the government.

MR. KRULWICH: I am only asking a question directed to the questions you asked Mr. Nixon on constitutional duties and I am seeking an answer to the question you asked. He can answer the question I asked.

MR. MORTENSON: My question was to his knowledge –

MR. KRULWICH: I believe you asked him where the official records were and how they were kept of the official records and documents reflecting certain of his constitutional duties. My point, what I was trying to ask the witness, was whether there are other types of constitutional duties that are of a sort different from those that you asked him about.

MR. MORTENSON: I am sorry, Counsel, I don't

understand the question. If the witness does, –

[163] MR. KRULWICH: If the witness understands he can answer; if not, so be it.

THE WITNESS: What are you trying to drive at? Let me get at it that way.

MR. KRULWICH: Let me see if I can rephrase it.

BY MR. KRULWICH:

Q. Would you agree that in addition to constitutional duties under Article 2, such as veto messages, State of the Union addresses, pardons, reprieves, which are expressed as a final public document, there are also constitutional duties under Article 2 that are not expressed in the form of a final public document and in that sense are of a more general nature, such as the duty to take care that the laws be faithfully executed, which would be expressed only in terms of papers, memoranda, letters, that are not part of the public official record, in the same sense that a pardon or a reprieve or an act of Congress that you have seen is. A. You know, that sounds like how many angels on the head of a needle. I still don't get the drift of what you are driving at.

I will agree there are many presidential duties –

Q. Well, – I am sorry, I didn't mean to interrupt you.

MR. MORTENSON: Counsel, I think if the question is are there other duties, if the President has a duty to take care that the laws be faithfully executed, I think that is clear –

THE WITNESS: Yes.

MR. MORTENSON: – clear in the Constitution. The [164] question is: Are those reflected in documents? If you have a document – I mean, I don't know what you mean by that.

THE WITNESS: As Commander in Chief, do you mean are they reflected? They will be defined. You probably will find those in the Defense Department, I imagine.

BY MR. KRULWICH:

Q. Are there documents relating to your constitutional duty to take care that the laws be faithfully executed that would not now at the present be reflected in the documents that are presently public? A. I don't know. I don't – I haven't had access to those documents.

MR. KRULWICH: Fine. I have no further questions.

EXAMINATION BY MR. ANDERSON:

Q. Along the same lines, isn't it a fact that your official duties as President went beyond those specific duties with which you were charged under the Constitution and statutes? A. My official duties?

Q. You mentioned several duties which you were charged under the Constitution, such as vetos and State of the Union messages. Don't the President's official duties go beyond those specific responsibilities mentioned in the Constitution and statutes?

MR. MORTENSON: I think that is a legal conclusion, Counsel. I don't know we have established the basis for his legal opinion on it.

[165] BY MR. ANDERSON:

Q. Let me put it this way. Would not gathering public support for a program such as conservation or Welfare reform be related to presidential action?

MR. MORTENSON: I have got to interrupt. I don't mean to be argumentative in your attempt to put the question, but the question is a legal conclusion as to whether or not a President has to engage in gathering support for a program.

MR. ANDERSON: I am trying to ascertain Mr. Nixon's view of his responsibilities as President so we can explore as to the relation of the presidential duties.

MR. MORTENSON: He has used the phrase of official action as those duties imposed by the Constitution and by the statutes.

MR. ANDERSON: All I am asking is, is that the only term that you consider related to your official duties as President. Are the rest all private, personal or political?

MR. MORTENSON: And he has testified that he has documents relating to the official actions.

MR. ANDERSON: I am not asking about documents right now, I am asking about Mr. Nixon's conception of his role as President and whether it goes beyond the specific duties of which he is charged under the Constitution and statutes.

MR. SPOONER: Mr. Mortenson, I don't understand what your objection is. Are you saying Mr. Nixon cannot state what the duties of the President of the United States are?

MR. MORTENSON: What I am saying is, I believe that it is a matter of law what a President can be charged with doing under the Constitution and by statute and that if a President deems his [166] role as gathering public support for a program of inflation control as something which he views presidential responsibility, that is not necessarily an official obligation of the President even though he may view it as an obligation that he has. But his responsibilities or duties that are imposed on him as the holder of that office derive from the Constitution and statutes.

BY MR. ANDERSON:

Q. Do you believe that gathering support for a program of Welfare reform was related to your official duties as President or would you put that in the category of political and personal activities? A. Well, is your purpose to determine whether or not I would consider that such materials, as such, be held in private and not be made public? What are we talking about?

Q. Is the paper work that would be generated on such subjects related to offical presidential actions?

(At this time the plaintiff and plaintiff's counsel confer out of the hearing of the reporter.)

THE WITNESS: Of course.

BY MR. ANDERSON:

Q. Is this often intermingled with political considerations? A. Always. Virtually always, if you want to get success.

Q. And this is related to official presidential action, whether there is a statute or not on the subject; is that [167] correct? A. It can be; yes.

Q. When your staff works on these subjects which are both political and official, they are acting within the appropriate scope of their White House duties? A. Yes, they are acting for the purpose of carrying out the presidential programs, eliciting support therefore.

Q. So these are not totally political in any sense? A. The line between what is political and official, if that is what your question is, is a blurred line. I would agree to that. But let us come right down to the nut cutting on the subject of what you want to know is what I believe a President, any President, I mean after he leaves office or his family after he is deceased, what his policy should be with regard to making public his papers and other materials, what we call presidential materials. I have already indicated that I believe that the policy should be as forthcoming as possible. I have already indicated that I would take a very hard line in terms of national security and under no circumstances would I move from that area without giving the gravest consideration as to what might be a current national security problem. And that means, of course, getting the national security clearance.

I also indicated that I would take a very hard line, firm line, with regard to any conversations that I considered to be private and personal, ones that might be, apart from embarrassment in the Webster sense, but one that might

inhibit another person's right to speak freely, to associate in his political area or what have you, because he had relied upon – [168] when he talked to the President had relied on the fact that he thought it was going to be confidential. And as far as private matters are concerned, for example, I made a number of telephone calls and had a number of conversations with my daughter prior to her wedding. Incidentally, if I kept that all segregated, anyone working with reels of tape you know it is just (the witness snaps his fingers three times) and I wouldn't have anybody believe me, no government associate, not my lawyers, not because there is anything to me that would be embarrassing, but because it is private to listen to the conversation other than myself or her.

MR. ANDERSON: I have nothing further.

(The time is 4:25 p.m.)

/s/ Richard M. Nixon

Richard M. Nixon

[169] STATE OF CALIFORNIA
COUNTY OF SAN DIEGO. : ss.

I, Joseph F. Weitzen, a notary public in and for the County of San Diego, State of California, duly commissioned, qualified and acting, hereby certify that the deposition of Richard M. Nixon, plaintiff herein, was taken by Defendants in Intervention pursuant to the applicable sections of the Code of Civil Procedure, before me, beginning at the hour of 9:00 a.m. on Firday, July 25, 1975, at the Coast Guard Station, in the City of San Clemente, County of Orange, State of California; that before the taking of said deposition the said witness was by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth in the testimony he was about to give in said action; that said witness was thereupon examined upon oral interrogatories propounded by counsel as aforesaid, and said witness made answer thereto, under oath, as hereinabove contained; that all of said questions and all of said answers thereto, as well as the

proceedings had at the taking of said deposition were by me duly taken down in shorthand and later transcribed into typewriting, as hereinabove contained; that I do further certify that the above and foregoing pages, numbered from 1 to 168, inclusive, contain a full, true and correct statement of all said interrogatories so propounded by counsel as aforesaid, and of all of the said answers made by said witness thereto, in the order in which said questions and answers were asked and answered, and of all of the proceedings had in said matter; that, pursuant to stipulation of counsel, as the same [170] appears herein, I delivered the original of this deposition to Richard M. Nixon, for the purpose of having the said witness read and sign his deposition, with the request that the said deposition then be returned to me for filing.

I FURTHER CERTIFY that the documents attached hereto and marked as Defendants' in Intervention Exhibits A through G, both inclusive, are the same documents referred to by both counsel and the witness, and as identified during the taking of said deposition.

I FURTHER CERTIFY that I am a disinterested person and that I am in no way interested in the outcome of said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at the City of San Diego, in the County of San Diego, State of California, this the 30th day of July, 1975.

/s/ Joseph F. Weitzen

[SEAL]

[171] STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO. : ss.

I, Joseph F. Weitzen, a notary public in and for the county of San Diego, State of California, duly commis-

sioned, qualified and acting, in accordance with the stipulation entered into between counsel, as the same appears herein, that the foregoing deposition of Richard M. Nixon may be signed before any notary public, submitted the said deposition to said witness, who thereupon read his deposition and made such corrections as appear noted therein in ink, duly initialed by me; that thereupon said witness in my presence subscribed his name to his said deposition at the end thereof, and before me took oath that his testimony, as contained in his deposition, as corrected, was the truth, the whole truth, and nothing but the truth.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal at the City of San Diego, in the County of San Diego, State of California, this the 16th day of August, 1975.

/s/ Joseph F. Weitzen

[SEAL]

EXHIBITS TO
DEPOSITION OF RICHARD M. NIXON
[Excerpts]

EXHIBIT C

1.1 RICHARD KLEINDIENST AND RICHARD McLAREN MEMORANDUM, APRIL 23, 1969, WITH ATTACHMENT

[SEAL]

Office of the Deputy Attorney General
Washington, D.C. 20530

April 23, 1969

MEMORANDUM FOR:

Honorable John Ehrlichman
Counsel to the President
The White House

Re: *ITT-Canteen Merger*

In accordance with telephone conversation this morning, enclosed is a Memorandum for the Attorney General dated April 7, 1969, and a draft of proposed complaint to be filed under Section 7 of the Clayton Act in opposition to the ITT-Canteen merger. As you will note, the theory of the complaint is that this merger would adversely affect competition in the vending and inplant feeding business in the United States by reason of the vertical and reciprocity effects potentially resulting therefrom.

Active reciprocity, as you probably know, involves the use, normally by a diversified firm, of its purchasing power to assist its sales efforts. Recipricity tends to exclude small and undiversified firms from the market. It is generally recognized that active reciprocity by a firm of significant size involves a violation of the Sherman Act (see Flynn, "Reciprocity and Related Topics Under the

Sherman Act", 37 *ABA Antitrust Law Journal*, 156-168, 178-182 (1968)).

The Supreme Court has also stated: "Reciprocity in trading as a result of an acquisition violates Section 7 if the probability of a lessening of competition is shown" *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 595 (1965). In *Consolidated Foods*, the case was tried after the merger had taken place and the Court found that there had been seven instances of affirmative use by the acquiring company to make sales on the basis of a reciprocity pitch. The next question is whether we must wait for completion of a merger involving substantial reciprocity power and opportunity until after the merger is consummated. The court in *United States v. Ingersoll Rand Co.*, 218 F. Supp. 530, 552; affirmed 320 F.2d 509, pointed out "the mere existence of this purchasing power might make its conscious employment unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages in securing the goodwill of the possessor." In other words, where the large diversified company makes substantial purchases from many suppliers, these suppliers are going to feel a "reciprocity effect" even without affirmative use of reciprocity by the purchaser.

It has been our position (contrary to that taken by the prior Administration) that conglomerate mergers involving very large firms violate Section 7 of the Clayton Act where (1) significant potential horizontal competition is eliminated; (2) the merger will create reciprocity power which will substantially lessen competition in lines of commerce occupied by either the acquired or the acquiring firm; and (3) where economic concentration and the triggering of further mergers may be anticipated, with effects condemned by Congress when it amended Section 7 of the Clayton Act in 1950.

In the instant case, our interpretation of Section 7 of the Clayton Act is nevertheless consistent with the somewhat narrower interpretation of Section 7 of the Clayton Act held by the prior Administration. Under the Justice Department "Guidelines" issued in May 1968, a rule was set out condemning mergers which create the danger of reciprocal buying (paragraph 19(a)). This guideline is set forth in full in the margin.[1] For present purposes, Canteen is "the selling firm" and ITT is the "buying firm". None of Canteen's competitors is affiliated with an industrial purchaser of anything approaching the size of ITT. We estimate that ITT makes purchases from suppliers accounting for approximately 1/3 of the industrial work force in the nation. Thus these suppliers, employing 1/3 of the work force, certainly account for more than 15% of inplant feeding. The second half of the guideline is satisfied by the fact that ITT would be "both a substantial supplier [of industrial products] and a more substantial buyer than all or most of the competitors of" Canteen. We know of no "special market factor" that makes remote the possibility that reciprocal buying behavior will actually occur.

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[1](a) Since reciprocal buying (i.e., favoring one's customer when making purchases of a product which is sold by the customer) is an economically unjustified business practice which confers a competitive advantage on the favored firm unrelated to the merits of its product, the Department will ordinarily challenge any merger which creates a significant danger of reciprocal buying. Unless it clearly appears that some special market factor makes remote the possibility that reciprocal buying behavior will actually occur, the Department considers that a significant danger of reciprocal buying is present whenever approximately 15% or more of the total purchases in a market in which one of the merging firms ("the selling firm") sells are accounted for by firms which also make substantial sales in markets where the other merging firm ("the buying firm") is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm.

ITT's argument is that it would not engage in active reciprocity; that reciprocity is unlikely in the vending and inplant feeding industries because service is an important element and employees have a substantial voice in the selection of the supplier; and that ITT's purchases from industrial suppliers are a small percentage of the total sales of those suppliers and therefore would not be influential in swinging their vending or inplant feeding purchasing.

The answers to these arguments are as follows. First, the fact that ITT might not aggressively use reciprocity will not eliminate the reciprocity effect, which could influence up to 30% of the business, and even a 6% foreclosure would be an adverse effect condemned by the statute; notwithstanding the service nature of the business and employee voice in selection, we have evidence that reciprocity does play a part in the inplant feeding business; finally, even though ITT as a buyer may account for a small proportion of the sales of a large firm, all other things being equal (price, service, etc.), even $100,000 worth of business per year is a matter of significance and clearly could give Canteen a decisive advantage over competitors who do not have affiliation with a large diversified firm such as ITT. [2]

We should add that, in connection with a specific investigation of reciprocity practices, we have found that reciprocity is particularly widespread, for example, in the steel industry, and that where one important member of an industry begins to use reciprocity, other members are virtually forced to follow suit.

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[2] A survey by *Purchasing Magazine* reveals that reciprocity influences purchasing decisions in large companies (over $50 million) far more frequently than in smaller companies. *Chemical Week Magazine*, in a similar study, also noted that chemical purchasing agents encounter reciprocity pressures only in dealing with large accounts.

In conclusion, we would like to make clear that the opportunity for the operation of reciprocity has been a substantial basis for antitrust challenges to "conglomerate" mergers under Section 7 in at least five cases. One of these—the FTC's case against *Consolidated Foods*—was decided in favor of the Commission by the Supreme Court. Two others—the Department's suits against acquisitions by General Dynamics and Ingersoll Rand—were decided in the Government's favor by the district courts and did not reach the Supreme Court. A fourth case—a suit by the Department against Penick & Ford—is now pending in the district court—while the fifth—the Department's suit against the acquisition of Jones & Laughlin Steel by LTV—was recently filed by the Department. Moreover, the Department's policy of challenging mergers on this basis has been clearly conveyed to the business community in the previous Administration's Merger Guidelines and is well recognized by business and the antitrust bar. We believe that the proposed case against the ITT-Canteen acquisition is squarely within this line of cases.

We find that the Justice Department's action in proceeding against mergers among the very largest companies has been very favorably received by business as well as by Congress and the public at large. We are very concerned that reduced activity along this line will ultimately result in unduly restrictive legislation, and perhaps a Public Utility Holding Company Act "death sentence" provision to undo the concentration which will result from a continuation of the present trend.

Vigorous enforcement of the antitrust laws, including preservation of small and medium-sized business and prevention of undue concentration, is traditional Republican doctrine. Our Section 7 policy is designed to implement that doctrine, and to avoid the dangers to the

economy posed by the current big-company merger movement, as outlined in Mr. McLaren's testimony before the House Ways and Means Committee on March 12, 1969 (copy attached, see pages 10-22). We understand that the Council of Economic Advisers fully supports our Section 7 policy and would strongly favor its continuance.

Accordingly, we urge that the proposed suit against the ITT-Canteen merger be approved, and that we be authorized to negotiate with ITT a "standstill agreement" which would permit the merger to be completed, but would preserve the identity of Canteen, assure a prompt trial, and provide for divestiture in the event that a violation of Section 7 is found.

/s/Richard G. Kleindienst
RICHARD G. KLEINDIENST
Deputy Attorney General

/s/Richard W. McLaren
RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

EXHIBIT D

6.1 JOHN DEAN MEMORANDUM, JULY 20, 1971, WITH ATTACHMENTS

THE WHITE HOUSE
Washington

July 20, 1971

MEMORANDUM FOR: BUD KROGH

FROM: JOHN DEAN

In your work on the Pentagon Papers and related issues you will become aware of the fact that there is a publication out of the Brookings Institute indicating that they are planning for the fall of this year a study of Vietnam based on documents of a current nature. Chuck Colson has made some efforts to determine what Brookings is up to but I don't think he has produced any solid evidence of the nature of this publication. I requested that Caulfield obtain the tax returns of the Brookings Institute to determine if there is anything that we might do by way of turning off money or dealing with principals of the Brookings Institute to determine what they are doing and deal with anything that might be adverse to the Administration.

Attached are copies of these tax returns and you will note that Brookings receives a number of large government contracts. You will also note that on the Board of Trustees there are several people who might be of assistance to us in dealings with the Brookings Institute, e.g., Peter Peterson and H. Chapman Rose.

When we discuss this issue I will also give you some additional background information on the Brookings problem.

EXHIBIT E

5.2 GEORGE BELL MEMORANDUM, JUNE 24, 1971, SSC EXHIBIT NO. 49, 4 SEC 1893-96, WITH ATTACHMENTS

1693

MEMORANDUM

THE WHITE HOUSE
Washington
June 24, 1971 EYES ONLY

MEMORANDUM FOR: JOHN DEAN
JERRY WARREN
VAN SHUMWAY

SUBJECT: OPPONENTS LIST

Attached is the list of opponents which we have compiled. I thought it would be useful to you from time to time.

/s/George T. Bell
George T. Bell

5.2 GEORGE BELL'S OPPONENTS LIST

[1694]

SUBJECT: *OPPONENT PRIORITY ACTIVITY*

Having studied the attached material and evaluated the recommendations for the discussed action, I believe you will find my list worthwhile for go status. It is in priority order.

1. PICKER, ARNOLD M.
   United Artists Corporation
   929 7th Avenue
   New York, N. Y.

   Top Muskie fundraiser. Success here could be both debilitating and very embarrassing to the Muskie machine. If effort looks promising, both Ruth and David Picker should be programmed and then a follow-through with United Artists.

2. BARKAN, ALEXANDER E.
   National Director of AFL-CIO's Committee on Political Education
   Washington, D.C.

   Without a doubt the most powerful political force programmed against us in 1968. ($10 million dollars, 4.6 million votes, 115 million pamphlets, 176,000 workers–all programmed by Barkan's C.O.P.E–So says Teddy White in The Making of the President '68). We can expect the same effort this time.

3. GUTHMAN, ED
   Managing Editor L. A. Times

   Guthman, former Kennedy aide, was a highly sophisticated hatchetman against us in '68. It is obvious he is the prime mover behind the current Key Biscayne effort. It is time to give him the message.

4. DANE, MAXWELL
Doyle, Dane & Bernbach
New York

The top Democratic advertising firm—They destroyed Goldwater in '64. They should be hit hard starting with Dane.

5. CHARLES DYSON
Dyson-Kissner Corporation
New York

Dyson and Larry O'Brien were close business associates after '68. Dyson has huge business holdings and is presently deeply involved in the Businessmen's Educational Fund which bankrolls a national radio network of 5 minute programs—Anti-Nixon in character.

[1695]

6. STEIN, HOWARD
Dreyfus Corporation
New York

Heaviest contributor to Mc Carthy in '68. If McCarthy goes, will do the same in '72. If not, Lindsay or McGovern will receive the funds.

7. LOWENSTEIN, ALLARD
Long Island, New York

Guiding force behind the 18 year old "dump Nixon" vote drive.

8. HALPERIN, MORTON
Leading executive at Common Cause

A scandal would be most helpful here.

9. WOODCOCK, LEONARD
UAW
Detroit, Michigan

No comments necessary

10. S. STERLING MUNRO, JR.
Senator Jackson's AA
711 Lamberton Drive, Silver Spring, Md.

We should give him a try. Positive results would stick a pin in Jackson's white hat.

11. FELD, BERNARD T.
President
Council for a Livable World

Heavy far left funding. They will program an "all court press" against us in '72.

12. DAVIDOFF, SIDNEY
New York City
Lindsay's top personal aide.

A first class S.O.D., wheeler-dealer and suspected bagman. Positive results would really shake the Lindsay camp and Lindsay's plans to capture youth vote. Davidoff in charge.

13. CONYERS, JOHN
Congressman, Detroit

Coming on fast. Emerging as a leading black anti-Nixon spokesman. Has known weakness for white females.

[1696]

14. LAMBERT, SAMUEL M.
President
National Education Association

Has taken us on vis a vis federal aid to parochial schools—a '72 issue.

15. MOTT, STEWART RAWLINGS
Mott Associates
New York

Nothing but big money for radic-lib candidates

16. DELLUMS, RONALD
Congressman, California

Had extensive EMK-Tunney support in his election bid. Success might help in California next year.

17. SCHORR, DANIEL
Columbia Broadcasting System
Washington

A real media enemy.

18. S. HARRISON DOGOLE
2011 Walnut Street
Philadelphia, Pa.

President of Globe Security Systems—Fourth largest private detective agency in U. S. Heavy Humphrey contributor. Could program his agency against us.

19. PAUL NEWMAN
California

Radic-Lib causes. Heavy Mc Carthy involvment '68. Used effectively in nationwide T.V. commercials. '72 involvment certain.

20. MC GRORY, MARY
2710 Macomb Street, Washington
Columnist

Daily hate Nixon articles.

EXHIBIT G

Donation of Personal Papers to
the Richard Nixon Library

The preservation of the papers and other historical materials of the President of the United States, together with the papers of his associates and contemporaries, is authorized by the Presidential Libraries Act of 1955.

Under this act, Presidential libraries have been established for Presidents beginning with Herbert Hoover.

President Nixon has indicated his intention to deposit his papers in a future Richard Nixon Library. It will be administered, like the six operating Presidential libraries, by the General Services Administration through its National Archives and Records Service. Adding the personal papers of the men and women who helped President Nixon shape national policies will give perspective and accuracy to the study and understanding of his administration. To this end, the President has asked Cabinet officers, heads of Government agencies, and key officials under them to deposit their personal papers in the National Archives for the Richard Nixon Library.

In a Presidential library, the papers of an individual, like the papers of the President, are kept intact as separate, named collections. They are in the care of a professional staff of archivists who can give intelligent guidance to those who may wish to use them in the future and provide reference on them as needed by the donor. Donors may place restrictions and conditions on the use of the papers when they execute a deed of gift.

Personal papers of a Government official are the files he has organized and maintained for his own personal use, but they must be distinguished from official records. Federal law defines official records as those preserved by an agency, or appropriate for preservation by an agency, as "evidence of the organization, function, policies, decisions, procedures, operations, or other activities of Government or because of the informational value of data in them" (44 USC 3300). The law requires that certain procedures be followed for the preservation or disposal of official records: they may be disposed of only with the approval of the Administrator of General Services.

Subject to these criteria, personal papers may include all or some of the following:

1. Personal correspondence of the official that does not directly concern the work of his office and that is not intended to be a part of the official records of the office. The correspondence may be with friends, family members, professional or business associates, or other administration officials. It may relate to purely personal interests or to national and State affairs, Government appointments, political campaigns, or other topics. Material in controversy or on personally sensitive matters may be protected by the terms of the deed of gift.

2 Working drafts and notes, used and unused; notebooks.

3. Appointment calendars; logs of telephone calls.

4. Speeches, extra copies; drafts of speeches; related correspondence.

5. Journals, diaries, scrapbooks, and press clippings.

6. Press releases issued by the office, extra copies.

7. Directories or lists of persons and positions in the office.

8. Personal photographs, motion pictures, and sound recordings.

A Government official customarily accumulates extra copies of Government documents for convenience of reference. Many of these are papers that he has drafted, reviewed or otherwise taken action on. They are evidence of his contribution to the agency and its programs. The official may retain such papers provided that they are eligible for disposition under Federal law as extra copies (44 USC 3301), and also provided that the agency records officer raises no objection to their designation as such. Materials classified under Executive

Order 11652 and those defined as "Restricted Data" under the Atomic Energy Act of 1954 must be handled in accordance with the provisions of the Executive order and of the 1954 act, respectively.

Physical objects belonging to the individual that have an association with the President or with the individual's Government service may also be part of an official's personal collection of historical materials.

In donating papers and other historical materials to a Presidential library, officials are reminded that the library contains papers covering the entire career of the President. It is therefore hoped that individuals will donate papers co ring their entire careers. The more complete the material, the more dependable it is as historical evidence and the more useful to future historians, biographers, and other researchers.

The great value of personal papers is that when they can be released for scholarly research—a matter for the donor to decide—they provide background information on people, politics, and public issues not to be found in official Government records. For the biographer, they may also contain indispensable information on an individual's civic and business affairs and his family life. When studied in conjunction with official records, personal papers help document the special knowledge, abilities, interests, and characteristics of the men and women who comprise the highest level of Government. A Presidential Library will hold all of this source material in trust, confident that both the Nation and the individual will benefit from the fullest possible documentation of this era.

National Archives and Records Service
General Services Administration
Washington, D C. 20408
November 1972

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

RICHARD NIXON, individually
and as former President of the
United States,

Plaintiff, Civil Action No. 74-1852

v.

Administrator of General
Services, et al.,

Defendants.

Washington, D.C.
Wednesday, July 30, 1975

Deposition of JEANNE DAVIS, called for examination by counsel for the Plaintiff in the above-entitled action, pursuant to notice, the witness being duly sworn by the Notary Public in and for the District of Columbia at the Third Floor Conference Room of the Civil Division, Department of Justice, Washington, D.C., at 9:30 a.m., Wednesday, July 30, 1975, and the proceedings being taken down stenographically by KATHRYN E. MILLS, and transcribed under her direction.

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Witness	Direct	Cross	Redir.	Recross
Jeanne Davis	3	77	81,86	83

EXHIBITS

PLAINTIFF'S:	MARKED
1	3
2	10
3	11
4	11
5	51

[3] PROCEEDINGS

Whereupon,

JEANNE DAVIS
was called as a witness on behalf of the Plaintiff, and after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MORTENSON:

Q. Would you state your name and address and position? A. Jeanne Davis, R.R. 1, Box 77, Broadrun, Virginia. I am at present the Staff Secretary of the National Security Council.

Q. I would like to have marked as Plaintiff's Exhibit 1 to the Davis Deposition a copy of a document labeled "Evidence of Jeanne W. Davis" which was submitted to Plaintiff's counsel on Monday morning, July 28th.

(The document referred to was marked Plaintiff's Exhibit Number 1 for identification.)

BY MR. MORTENSON:

Q. I would like you to look at Plaintiff's Exhibit 1 and tell me whether you recognize it as an affidavit which you executed on Friday, July 25, 1975? A. I do.

[4] Q. What time of day did you execute that? A. By "execute" do you mean sign?

Q. Sign, sign the document. A. I don't remember exactly.

Q. Was it in the morning? A. I believe it was in the afternoon. I don't remember exactly.

Q. Was it late in the afternoon? A. I would say mid-afternoon but as I say I don't have a specific recollection.

Q. Apart from discussing or working on this affidavit or the substance of the affidavit with counsel from the Justice Department representing the Government defendants, have you – does this affidavit represent the product solely of your work? A. Some members of my staff assisted in some of the factual information. The final product is my work.

Q. Which members of your staff assisted in the factual aspects of the affidavit? A. Mr. Steven Skancke, Mr. John Murphy.

Q. Are those the only two members of your staff who assisted in the preparation of this affidavit? A. Yes.

Q. What is Mr. Skancke's position? [5] A. Mr. Skancke is an Assistant to me working primarily on declassification and freedom of informati... issues. Mr. Murphy is the Director of the Document Control Section of the Secretariat.

Q. Would you classify both Mr. Skancke and Mr. Murphy as administrative personnel at the NSC staff? A. Yes, I would.

Q. Do either have substantive responsibilities in any area involved with NSC? A. No.

Q. Do you know if your affidavit or any portion thereof was reviewed by any other member of the White House or any member of the NSC staff? A. Yes, by General Brent Scowcroft. It was also reviewed by Mr. William Casselman.

Q. Do you know whether Mr. Buchen reviewed your affidavit? A. No, I do not.

Q. Do you know whether Mr. Sonnenfeldt reviewed your affidavit? A. No, sir.

Q. What about Mr. Eagleburger? A. No, sir.

Q. Did Mr. Kissinger discuss your affidavit with you? [6] A. No.

Q. Do you know whether he reviewed it? A. I do not know.

Q. Apart from General Scowcroft, you know of no other senior NSC staff member who reviewed your affidavit? A. I do not.

Q. Did you discuss in the preparation of your affidavit the substance thereof with either General Scowcroft or any senior NSC staff member? A. No, not during the preparation.

Q. Yesterday, when you received word that Plaintiff's counsel had requested your deposition, what steps did you take in connection with the preparation for this deposition? A. I was informed by the Justice Department by telephone yesterday. I asked for some statistical material from people in our secretariat. I discussed the matter with Justice Department attorneys and interviewed some of my people who had prepared these statistics to be sure that I understood.

Q. Which people did you interview? A. I discussed it with Mr. Skancke, with Mr. Murphy, with Lt. Col. McFarland and with Mr. Roberts, Ed Roberts.

Q. Did you discuss with Mr. — A. I am sorry. Ms. Kathryn Troia also.

[7] Q. Did you discuss the deposition with Mr. Buchen or Mr. Casselman or any member of their staffs? A. I did not discuss it with Mr. Buchen. Mr. Casselman was present yesterday when I discussed it with the Justice Department Attorneys.

Q. What is Lt. Col. McFarland's position? A. He is a general assistant in the Office of General Scowcroft.

Q. Mr. Roberts? A. He is an NSC employe in charge of the Presidential files maintained in the west basement of the White House.

Q. When you say that he is in charge of the Presidential files in the west basement of the White House are you talking about NSC related Presidential files? A. Yes. I am talking about the files maintained by NSC personnel but are considered Presidential files.

Q. What is Kathryn Troia's position? A. She is an assistant in the office of Mr. Kissinger in the White House. She also works on files.

Q. When you say she is an assistant to Dr. Kissinger is she an administrative assistant? A. She is a staff assistant and works primarily on the file material.

[8] Q. Does she carry secretarial responsibilities? A. Secretarial?

Q. Yes. A. No.

Q. Who is Dr. Kissinger's secretary? A. He has several. Irene Derus is one. Do you mean the secretaries in his immediate office who serve both him and General Scowcroft?

Q. Yes. A. Mrs. Lora Simkus, Mary Stifflemire, Mrs. Florence — I can't remember her last name. There are other secretaries who come in in the evening to man the office. I do not recall all their names.

Q. The three women you named and the fourth whose last name you could not remember, to whom do they report? A. To Mr. Kissinger or to General Scowcroft who is his Deputy.

Q. To anyone else? A. No.

Q. In preparing for this depositin today, you said that you requested some statistical information. What materials did you bring with you to the deposition? A. The list of examples of occasions to have access to [9] material from Presidential libraries, previous presidents, some figures on the number of boxes of material both originals and copies of NSC and Presidential material that have been retired to the special vault where President Nixon's materials are maintained.

Q. May I see those, please? A. Yes.

Q. Did you bring any other material with you to the deposition? A. No, except for a document here on which that is based.

Q. Is this the document you provided to counsel for

Plaintiff prior to the commencement of the deposition? A. Yes.

Q. Would you identify it? A. It is a log of access by NSC staff employees to the vault on the 2nd floor where President Nixon's material is kept.

Q. And you say you brought in addition with that log a summary or explanation of what is contained in the log? A. No.

Q. What are you holding in your hand? A. This was a backup document for the preparation of this.

[10] Q. May I see that, please?

MR. ANDERSON: Why don't you try to identify the documents. All we have to go on is the control record.

THE WITNESS: All right. This is a memorandum prepared by Mr. Murphy for me for this deposition which gives figures on the number of times that we have had reason to request material – I am sorry. Which we have been asked by the National Archives to review material obtained from the Presidential Libraries of Presidents Johnson, Kennedy, Eisenhower and Truman for purposes of mandatory review, declassification and release.

MR. GOLDBLOOM: It might be helpful if you had those documents marked in connection with the actual description.

MR. MORTENSON: We would like to introduce for the record at this time Plaintiff's Exhibit 2 to the Davis deposition which Mrs. Davis has described as a log or record of access, withdrawal and copying of documents from Nixon Administration records in Room 205EOB.

(The document referred to was marked Plaintiff's Exhibit Number 2 for identification.)

MR. MORTENSON: We would like to introduce as Plaintiff's Exhibit 3 to the Davis deposition a summary prepared [11] for Mrs. Davis describing access to Presidential Library materials. The document is dated July 30, 1975.

(The document referred to was marked Plaintiff's Exhibit Number 3 for identification.)

MR. MORTENSON: We would like marked as Defendant's Exhibit 4 the memorandum prepared for Mrs. Davis dated July 30, 1975, entitled "Subject: Request for Evaluation of Documents from the Presidential Libraries."

(The document referred to was marked Plaintiff's Exhibit Number 4 for identification.)

MR. MORTENSON: I plan to ask a series of questions on those documents. Do you want to get some copies made?

MR. GOLDBLOOM: Yes.

MR. MORTENSON: We will take a short recess while copies are made.

(Brief recess.)

MR. MORTENSON: Back on the record.

BY MR' MORTENSON:

Q. Mrs. Davis, Plaintiff's Exhibit Number 2 which you have described as a log for access to the Nixon materials contains a number of entries. Could you, starting with the first entry, [12] in terms of chronology, the earliest chronological entry, state for us what the nature of the entry was and the purpose for that entry? A. May I say that before I do that, in many cases I will not have personal knowledge of these entries. They were made by people other than myself. I can describe what I know about the material contained in these citations.

Q. In your affidavit you say you are in charge of the maintenance of the official NSC files. That does not entail, I take it, the actual supervision of who goes in and comes out of NSC files or the purposes for that entry. A. I personally am not responsible for that, no.

Q. Can you give us your best information on each of these? A. Yes. The first I think is self-evident, a malfunction of the room alarm.

Q. Which page of this document is that and what is the entry date? A. That is November 11, 1974.

Q. Please describe that? A. These pages are out of order. That is correct. November 11, 1974, time in 16:12, time out 16:18, person having access, Mr. Ed Roberts.

[13] NSC staff. The purpose was malfunction of the room alarm. The technical security division office checking is the notation.

Q. So that we can facilitate the review of this, could we mark Plaintiff's Exhibit Number 2 and the page you are referring to as page 1?

Going to the second entry, would you describe the stated purpose for that entry?

A. Of my own personal knowledge, I cannot describe why they specifically wanted the dinner guest list from the visit of Prime Minister Trudeau which is the item requested.

Q. Do you know in the final column of that entry what the entry states? A. Checked by phone with NSC document.

Q. So your testimony is that you have no basis for knowing whether or not that entry into the Nixon Presidential files of the NSC was for anything related to the national security or foreign policy of the United States? A. From my personal knowledge, no, I would not. I would have no knowledge.

Q. Would Mr. Roberts have knowledge of that? A. It is possible.

Q. Would you move to the next entry on page 1? [14] A. Entry dated November 16, 1974, time in 17:36 time out 17:43. The entrant, Mr. Roberts of NSC, the item Vietnam material for trip Japan, Korea, USSR; it was shown to Rodman, Peter Rodman, Mr. Kissinger's staff, and returned.

Q. Do you know what particular file that was? A. No, I do not.

Q. Do you know how many files that was? A. No.

Q. Would you describe for me what the material was in the next entry which says CD material looked at? A. CD is an abbreviation for Camp David. Much of our Vietnam material is contained in files described as the Camp David file. References to CD refer to Vietnam material maintained in this file which is entitled "Camp David File."

Q. Do you have any basis for knowing what the material retrieved from the Camp David file consisted of? A. No.

Q. Do you have any basis for knowing what the Vietnam material referred to in the previous entry consisted of? A. No.

Q. The next entry says placed 30 boxes of files in vault. Does that indicate to you that no material was removed or viewed? [15] A. Yes, it does.

Q. The next entry under the column labeled what says 1969 papers on Thailand. Do you know what was written under that? A. Ernest May study, and TS stands for top secret.

Q. The entry under action is what? A. Van Eron, a member of the document control staff and the entry is not the report we were looking for.

Q. Do you know what the top secret study was that Mr. Ernest May was working on? A. Yes, I do.

Q. Do you know what report it was that he was looking for? A. Yes, I do.

Q. Was that report subsequently found? A. The first half of the report was found.

Q. Where was that found? A. In the [NSC maintaned files in the west basement of the White House] files of the Program Analysis Section of the NSC Staff.

Q. Is that in the institutional files? A. No, sir.

Q. That is a separate filing system? A. This is the file which I have described in my affidavit of Presidential

material, not institutional material, [16] which is maintained by NSC personnel in the west basement of the White House.

Q. Was this among the Ford Presidential materials? A. No, sir.

Q. This was among the Nixon Presidential material in the west basement of the White House? A. Yes.

Q. So your testimony is that all of the Nixon Presidential material is not in the vault adjoining room 205 of the Old DOB? A. All of the material, the originals and the copies of material with the exception of the material which I have described, some material which I have described in the four general subjects of my affidavit is now, so far as I am aware, in the vault housing Mr. Nixon's papers.

It took some period of time in the months, early months, to identify and move all of the material into that vault. There was a period of time when this movement was taking place where some of the materials were still maintained in this basement.

Q. As of November 26, 1974, the report Mr. Ernest May was looking for which was considered a Nixon Presidential material had not been stored with the Nixon Presidential materials in the [17] vault? A. That is my recollection. May I describe a little bit the nature of this request which may help explain?

Q. Please do so. A. The request for declassification of this study came to us from the Murphy Commission, the Commission which was studying the organization of the Executive Branch in the area of foreign policy.

They asked us to review for declassification a study which had been prepared for the NSC by Dr. Ernest May in 1969 on Thailand. They wanted Dr. May to use this in preparing a case study for the Murphy Commission.

We searched our own files and located what we thought was the document. Dr. May came down to review it. When he reviewed it, he told us that this was only

a part of the full study and that there was an additional portion of the study.

It was that additional portion which we were looking for when we went into the vault in November of 1974.

Q. And which you found in the Nixon presidential materials still in the west basement of the White House? A. Is it still in the west basement of the White House?

Q. That is the portion of the report you found? A. Was at that time in the west basement of the White [18] House. It was subsequently moved into the vault.

Q. Part of Mr. May's study was in the institutional files and part was in the Presidential files? A. No, sir. The part – we never did find the second part of Mr. May's study. The part we found at the time we located it was in our own files. However, subsequent to that, it was moved into the vault.

Q. Now, you described, I believe, the Ernest May study as a report or a study prepared for the NSC Council? A. Prepared at the request of the program analysis section of the NSC staff.

Q. All right. Now in your affidavit in describing the institutional files in paragraph 5, you state that the institutional files contain all the reports and recommendations prepared for the Council. Was this not, then, a report or a recommendation prepared for the Council? A. It was prepared for the council staff.

Q. What is the difference between the –

MR. ANDERSON: Can the witness answer the question?

THE WITNESS: It was prepared for the council staff.

BY MR. MORTENSON:

Q. And reports and recommendations prepared for the council staff are not included in the institutional files. [19] A. They should be included in the institutional files, yes.

Q. Then is it your testimony that this study prepared

by Ernest May was improperly filed in the first instance? A. I just am not sure.

Q. If you were filing or instructing a member of your staff to file Mr. Ernest May's study at this point would you include it in the institutional files or in the Ford Presidential files? A. In the institutional files.

Q. Can you describe the entry under the what column listed 12-17-74? A. Placed 50 boxes of files in vault.

Q. From that entry would you – would that indicate to you that there was no entry on that occasion to review documents? A. That would be my assumption.

Q. Would the same be true of the entry below that labeled 1-2-75? A. Yes.

Q. Would the same be true as the next entry labeled 1-2-75? A. Yes.

[20] Q. Moving to page 2 of the report with the first entry being 2-7-75, do you have any information pertaining to the meaning of the entry under the what column for that date labeled HAK trip folder, something, and December, 1972? A. HAK are Mr. Kissinger's initials.

Q. Do you know what trip that was? A. No.

Q. Do you know why that document was removed? A. No, I do not.

Q. Do you know what type of materials would be contained in that folder? A. I do not know what is in this specific folder. I can tell you that the trip folders normally contain the briefing material prepared for the conversations on the trip and they often contain memoranda of conversations, meetings on the trip.

I do not know in this specific case.

Q. The next entry says K. Troia and under the what column says nothing. Do you know what that represents? A. I do not.

Q. The next entry under the what column states Intel Memo for Mrs. Davis. Do you know what that involved? A. That was a memorandum that Mr. Roberts was obtain-

ing [21] for me. I am sorry. At this point I do not recall what it was.

Q. Do you recall whether it had to do with anything dealing with foreign policy? A. I just do not recall the specific memorandum.

Q. The next entry under that in the what column says Nixon letter to President Thieu, all of which is scored through and then President-Cor.-VN. Do you know what that entry is? A. Yes, sir. That was the request, as indicated in the action column by General Scowcroft to see all of the Presidential correspondence having to do with Vietnam.

Q. Do you know the basis for Mr. Scowcroft's request? A. No, I do not, specifically.

Q. You have no knowledge of why he wanted to see the Presidential correspondence on Vietnam? A. I have no specific knowledge.

Q. The next entry says CD October-December, 1972. Do you know what that entry involved? A. CD refers to the Camp David file which is the file of material on Vietnam.

Q. The next entry says CD files for Rodman. Do you know what that entry involved? A. Camp David files. Mr. Rodman is a member of Mr. Kissinger's staff.

[22] Q. Do you know why Mr. Rodman needed access to those files? A. No.

Q. The next entry says return correspondence VN take large safe to WH office. A. The Presidential correspondence being returned was the correspondence which had been pulled earlier for General Scowcroft. The large safe referred to was an empty safe which was moved from the vault.

Q. What was the date on which the Presidential Vietnam file was removed from Mr. Scowcroft and then returned? A. The file was removed on April 4th and was returned on April 9th.

Q. The next entry says check alarm and the entry under that says installing alarm. Have you had some alarm problems? A. We have.

Q. The next entry is checking files and the person listed is Kathryn Troia. Do you know what that entry involved? A. I do not.

Q. Do you have any basis for knowing whether it involved security or national foreign policy? A. I do not.

Q. The next entry on page 3 lists under the what column [23] checked files for accurate classification. Do you know what that involved? A. Yes, I do. As I have described in paragraph 16 of my affidavit, we have been reviewing some of the original documents in those files to determine that they were properly marked with the declassification category, either what we call the GDS, general declassification schedule or XGDS, exempt from the general declassification Schedule. These are schedules which were set out in Executive Order 11652.

We have been going through some of the material to be sure it was properly marked.

Q. Has that review been completed? A. I don't know.

Q. There are three separate entries by Kathryn Troia which appear to be for purposes of checking files for accurate classifications, is that correct? A. From the log, yes.

Q. During that checking for accurate classification were documents that were not previously classified, classified? A. Not to my knowledge. I don't know.

Q. Do you know whether there were any that were classified that were upgraded in classification? A. Not to my knowledge.

[24] Q. Do you review or assist Kathryn Troia in this work? A. No.

Q. To your personal knowledge, you don't know what Kathryn Troia did while she checked the files for classification? A. No.

Q. Who informed you that you have been required to review the original documents to determine whether they were properly classified and properly marked with the classification and exempt categories pursuant to Executive Order 11652 you have discovered documents which are not currently classified as marked you will add the requisite classification. A. Mr. Murphy.

Q. Does the sentence in your affidavit in paragraph 16 which starts when we have discovered documents which were not correctly classified, or marked, does that sentence imply to you that documents have been classified which were not previously classified or correctly classified? A. Not specifically. Correctly classified could mean that only the first page was marked and subsequent pages were not marked. It could mean such things as that.

Q. To your knowledge, you don't know whether documents were upgraded in classification or downgraded in classification? A. I do not, no.

[25] Q. When you refer to the we, is that a rhetorical we in that you had no control in this activity? A. That is correct.

Q. The next entry by Kathryn Troia checks DC file. Do you know anything about that entry? A. No.

Q. The next entry is labeled seven SALT files for memo by KW Smith of unknown date. The action column is not found. Do you know what the basis of that access was? A. I do not.

Q. Do you know whether that document was subsequently found? A. I do not.

Q. The next entry says checked back channel file for dates. Nothing removed. Do you know what that involved? A. No.

Q. Do you know whether that entry involved national security or foreign policy? A. I do not.

Q. The next says checked for a 1969 memo for HAK office. The action is nothing removed. Do you know what

the basis was for that entry? A. I do not.

[26] Q. Do you know whether it was for foreign policy or national security? A. I do not.

Q. The next entry is check VN file for date. Nothing removed. Do you know the base for that? A. No.

Q. The next one is attempt to identify paper requested by Church Committee. Nothing removed. Do you know the basis for that entry? A. I do not specifically.

Q. Do you know whether it involved national security or foreign policy? A. I do not know specifically except that the Church Committee activities, the nature of the Church Committee documents, and the documents that they have been requested all contained elements of foreign policy.

Q. Has the committee – has the NSC provided any Presidential files of the Ford Administration to the Church Committee as opposed to the institutional files? A. I don't know.

Q. Do you know whether any institutional files of the Ford Administration, NSC, have been provided to the Church Committee?

[27] MR. ANDERSON: I think – I want to be sure I understand that question.

Institutional files do not necessarily belong to any administration.

MR. MORTENSON: I am talking about institutional files of the NSC contemporaneous with the Ford Administration.

THE WITNESS: I do not believe so. I would have to do specific checking.

BY MR. MORTENSON:

Q. Would the production of any such document be handled through you? A. Ultimately, no. It would be the Office of the White House Counsel.

Q. Is it fair to say that persons have access to the vault containing the Nixon Presidential NSC files without checking with you before going in or coming out? A. Are you speaking of persons on the NSC staff?

Q. Yes. A. NSC staff personnel have – do not have to check with me before going in and out of the vault. However, there is a very limited number of people who have the combination of the vault.

Q. The next entry lists CD files for Rodman – I am sorry.

[28] I have moved to the wrong page. Strike that question. The final entry on page 3 lists additional copies of NSC materials for Nixon files and the last portion of that entry is obliterated. Do you know what that last portion is? A. I can't read it.

Q. Do you know the basis for that entry? A. I believe I am correct in saying that this was the period at which we moved into the vault copies of Nixon material. We had moved all the originals into the vault first and we subsequently began to round up copies of the Presidential material of that period and move the copies into the vault as well.

I am pretty sure that is what this entry refers to.

Q. When you talk of "we" who was involved in that process? A. The entire staff was involved in identifying copies of materials which might have been retained in various locations. The people who actually pulled it together and made the transfer were the people in the document control section, in the secretariat and also Mr. Roberts in the files of the west basement.

Q. Why were the copies rounded up from the various NSC staff members files or other files to be placed among the [29] Nixon files? A. To be sure that we were in compliance with the court order for the sequestering of those files.

Q. Turning to page 4, the first entry under the what column says to pull NSC material inadvertently committed to Nixon records. Do you know the basis for that entry? A. I do not know the specific material. I do know that at one point we identified some institutional material that had been mistakenly transferred into the presidential vault. We removed the institutional material. I do not recall specifically what the material was.

Q. Do you see that being done? A. I did not.

Q. Did you talk with Mr. Roberts whose name appears in the who column about that? A. Not directly, no.

Q. Do you know what institutional files he removed? A. I do not know that, no.

Q. Do you know whether that was related to anything dealing with foreign policy? A. I –

Q. The removal itself? A. I am not sure I understand your question.

[30] Q. Do you know whether in Mr. Roberts going into that file and going into the vault and removing those files, whether it was done at the request of anyone who needed those materials for a matter dealing with foreign policy? A. I do not know that specifically.

Q. Next five folders of background messages to be removed by Rodman. A. Yes.

Q. Do you know what that entry involved? A. No, I do not.

MR. KRULWICH: Is that background or back channel?

MR. MORTENSON: Back channel.

BY MR. MORTENSON:

Q. The next entry said check FOIA request-NSC. Do you know the basis of that entry? A. No, except as it appears here. The numbers indicated are the log numbers, NSC log numbers of specific items.

Q. Would you describe what NSC log numbers of

specific items means? A. We have a logging system in our secretariat. When material comes to the NSC for staffing, it is logged, assigned a number, action is assigned to an individual and information and action copies are distributed. From that time, that incoming letter [31] or whatever it is and the documents that are prepared in response to it all bear that same number. This is a matter of file identification.

Q. Is that file number then, computerized? A. Yes.

Q. Would an incoming letter from a head of state to Dr. Kissinger receive a file number? A. Under normal circumstances, yes.

Q. And informational copies would be distributed? A. It would depend on the nature of the item. If it were a very, very sensitive item, it might be handled in a very sensitive, very limited way.

If it were a normal item, it would come in, receive a log number, and original or a copy would go immediately to Mr. Kissinger and depending on his views, action would be assigned, possibly to a member of our staff, possibly to a member of State to prepare a reply.

Q. The distribution of an informational copy would be dictated by the necessity of additional people knowing by that communication? A. Yes.

Q. Would the same be true of correspondence that comes to the President dealing with national security or foreign [32] policy matters? A. Correspondence coming to the President if it were to be staffed through the NSC would receive the same treatment with the understanding that particularly sensitive documents would be very limited.

Q. If you went to the computer and informed the computer you were looking for the document containing the identification 20313, would you receive from the computer a list of the documents bearing that number? A. We would receive an identification of the nature of the

document and we would receive a history of the action taken on the document, to whom it was assigned for action, at what time action was taken, and so forth.

Q. Are these computer records part of the NSC institutional files? A. It is hard to say. To the extent that they relate to material that is in the institutuional files, I would say yes, they are. However, the secretariat and the staff support Mr. Kissinger both in his institutional role and his noninstitutional rule as an assistant to the president.

So that to the extent that the computer records pertain to the institutional materials, they would be part of the institutional file. To the extent they do not, I would not be [33] sure.

Q. You said though that materials which would be considered part of the presidential files of the NSC would receive the same sort of computer identification? A. Yes.

Q. So that mixed into the computer, if you punched in the number 20313, you would get back documents containing that number, whether it was originally found in the institutional or the presidential file? A. Yes. However, one of the entries is whether or not it is to be filed in the presidential file or the institutional file.

Q. Did the computer system exist before the Nixon Administration? A. No.

Q. Was this something that came about during the Nixon administration? A. Yes.

Q. In complying with the court order concerning segregation of the Nixon Presidential materials, has any portion of this computer record been stored with the Nixon Presidential materials? A. I believe so, but I do not know for sure.

[34] Q. Is that a copy of the computer record? A. I am not sure.

Q. Who operates the computer or maintains it? A. Let me be sure I understand you. Do you mean who accesses

the computer from our staff?

Q. Yes. A. The overall control is in the document control section of the secretariat, NSC secretariat.

Q. Who maintains the computer? A. It is maintained by the White House communications agency. The technical staff.

Q. If the Nixon Presidential materials presently in the vault were in some other location and Mr. Roberts in checking with this FOIA request had gone to the identification number 20313 would the computer have told him where documents related to that number should be found? A. Once the item is completed, the computer would have shown him where the documents were to be found.

Q. Were all the documents in the NSC's institutional file containing an NSC computer number? A. Yes, I believe so.

Q. Would all the documents in the Presidential files, NSC files, contain a computer identification number? [35] A. All of those which have been handled by the NSC system in the normal manner. Some sensitive things are receiving limited treatment.

Q. What type of material would get into the Presidential NSC files that would not receive a computer number for identification purposes? A. Although this is not a specific example, I can see where a particularly sensitive exchange of correspondence between a president and a head of state which did not involve any NSC institutional problem would not have a computer number on it.

It might have been handled immediately by the President or Mr. Kissinger.

Q. What type of problem would you classify as not involving an NSC institutional matter? A. An exchange of correspondence between heads of state on a particular foreign policy issue or one that has not been through the normal NSC system. I described some of this type of

information when I described the material that is maintained in the Presidential files by the NSC people as opposed to the NSC institution files.

Q. To try to get an example, if Mr. Brezhnev were to send President Ford a letter dealing with the sale of wheat [36] to Russia and if President Ford considered what a sensitive item of correspondence, might that letter wind up in the NSC Presidential files and not be given an identification number? A. It is possible that it would not receive an NSC number similar to these computer numbers. There is a system for identifying some of this extremely sensitive material with which I am not familiar.

Q. Who would be familiar with that? A. Mr. Roberts probably.

Q. Would you know in the example I have just given whether Dr. Kissinger would receive a copy of that communication? A. It would seem he would.

Q. Do you know where he would maintain that? A. I don't know for sure. It is possible he would maintain it at least temporarily in his own office. I would expect – well, I don't know.

Q. Does Dr. Kissinger maintain a set of files in his own office which you have no access or supervision over? A. Yes, he maintains certain things in his immediate office.

Q. Do you know what those certain things are? A. No.

Q. If Dr. Kissinger receives a particular document [37] and requests his secretarial staff to maintain it in his files, is it possible that you would not become aware of that document or indeed other people in the NSC not become aware of that document until Dr. Kissinger determined to place it in the NSC filing system? A. It is possible.

Q. The next entry on page 4 lists organized files under the what column and nothing removed. Do you know what the basis was of that entry? A. Not specifically, no.

Q. The next entry says box number 2 of China material for review by Troia. Do you know what the basis for that entry was? A. Not specifically.

Q. Do you know generally? A. No.

Q. Did you discuss this with Mrs. Troia? A. No.

Q. Do you know whether or not it had to do with a particular matter of national security or foreign policy? A. Not specifically, no.

Q. The next entry says organized files, nothing removed. Do you know the basis for that entry? [38] A. No.

Q. What is an FOIA? A. The letters stand for Freedom of Information Act. We have received a flood of requests for declassification and release of classified material. This has been one of the main reasons that we have gone into various Presidential files to identify such material and review it in response to requests.

Q. Has this flood of FOIA requests concerned the NSC staff? A. To what extent?

Q. Concerned the staff as to required disclosure of NSC documents? A. We have reviewed each case on its merits and in some cases we have determined that they should not be declassified and released. To that extent, yes, it has been a concern to us.

Q. As a general matter, the fact that there has been under the new statute a flood of FOIA requests concerned even some members of the NSC staff? A. Are you talking in general terms, the fact –

Q. Yes. A. Yes, it is of general concern that we are being asked to declassify.

[39] Q. Why is that? A. Because many of these foreign policy and national security issues are extremely sensitive. Many of them involve our relations with other countries. Many of them involve information we have received from other countries.

Under the various exemptions categories of the Freedom of Information Act we have determined that much

of this material is exempt from declassification and release.

Q. Has there been a determination whether or not the portions of the NSC files considered as Ford administration files are subject to requests under the Freedom of Information Act? A. It is my understanding – no, to my knowledge there has not been such a determination.

Q. Is it fair to say that the entries which indicate the review of the Nixon Presidential materials for purposes of classification which you have described generally arises in part from this concern you described about the FOIA requests? A. To the extent, yes, to some extent.

Q. Having gone through each of the entries in the Plaintiff's Exhibit 2, can you state that this represents each access by NSC staff members to the Nixon presidential materials? A. I cannot verify of my personal knowledge that this [40] represents each access. The purpose of this log, however, was to record each access. I have no reason to believe that there are others, nor can I verify that these are the only ones.

Q. So that I don't mischaracterize your testimony in trying to summarize this document, would you once again review it and tell me whether from your personal knowledge or discussions with people whose names are listed for the access, do you know of any of these instances in which the access involves requests dealing with national security or foreign policy? A. From my own personal knowledge, since I was not involved personally in these file searches, I cannot say. However, I should qualify that by saying that the descriptions of some of the material in the what column would indicate to me that certain of these entries were made for such purposes.

Q. Would that be true of the item on page 1 which lists PM Trudeau dinner book guest lists? A. The fact that this was a guest list for a dinner would indicate that it was a non-substantive request.

Q. In preparing your affidavit, and discussing the preparation thereof with Mr. Skancke and Mr. Murphy, did either of these gentlemen tell you that of their own personal knowledge they knew the basis for any of these accesses? A. No.

[41] Q. Is it fair to say that your statement in paragraph 10 of the affidavit – in clearing out current government business it has been necessary to review certain papers of the Nixon Administration contained in the Room 207 of the Old Executive Office Building?

You made that statement based upon your judgment of the descriptions contained on access request list and not based upon your discussions with persons other than Mr. Murphy and Mr. Skancke?

A. Let me be sure I understand. Could I have the question, again, please?

(The record was read by the Reporter.)

THE WITNESS: I made this statement based in part on the descriptions of the material requested from the log. In addition because I have had occasions in connection with my own business to – my own institutional business – to request material from various files, I know that file searches have been done at various places.

Some of this material, although I may not know specifically the reason for the entry on a particular day at a particular time, I have a general knowledge of the substance of the ongoing work, –

Q. There is only one request listed under the what column [42] which mentions your name, is that accurate? A. That is correct.

Q. Is it accurate that you do not recall what the purpose of that was? A. Not specifically.

Q. Do you recall generally? A. No.

Q. Do you recall any other instance in which you have requested or received information that you were told came from the Nixon Presidential files? A. I cannot at

this moment recall a specific instance, although I – I cannot so cite a specific instance but when you say Presidential files, you mean President Nixon?

Q. Yes. A. I cannot recall a specific instance. However, I am – it might be possible to check the record. I do not recall such an instance now.

Q. Do you recall a specific instance when you made the statement contained in the first sentence, paragraph 10 of your affidavit? A. I – did I recall a specific instance not directly related to the log?

Q. Did you recall any specific instance requiring [43] the current government business necessity of review of the Nixon NSC Presidential materials?

MR. KRULWICH: May I have that question read back?

(The record was read by the Reporter.)

THE WITNESS: I recall a request for a Church Committee –

MR. GOLDBLOOM: I am going to object to that question because I am not sure I understand it. The witness has been testifying extensively about an access sheet concerning access to President Nixon's materials. As I understand this question, is that designed to encompass all of the access items listed on that sheet or is it to be in addition to them?

MR. MORTENSON: The question is designed to get at the basis for Mrs. Davis' statement that in carrying out current government business it has been necessary to review certain papers of the Nixon Administration contained in the vault in Room 207 of the Old Executive Office Building.

I believe it is fair to characterize her testimony as having no knowledge of any of the entries except the Church Committee report.

MR. GOLDBLOOM: I don't accept that characterization.

MR. MORTENSON: That is what I am asking so I don't mischaracterize.

[44] MR. GOLDBLOOM: That is a mischaracterization. Many of the access items bear on their face a clear explanation or identification of subject matter which relates to national security or foreign policy. I know we may quibble with whether or not the witness knows precisely the information being sought after by the access, but I think the subject matter of the access incident under the what column is quite self-evident.

BY MR. MORTENSON:

Q. Let me return then to page 2, –

MR. GOLDBLOOM: I am also puzzled by the request. Are you asking the witness about the specific examples listed in paragraphs that follow paragraph 10 which seem to be specific examples of the kind of thing that you are asking about?

MR. MORTENSON: No. I will restate my question. Rather I will state another question in its place.

BY MR. MORTENSON:

Q. On page 2 of Plaintiff's Exhibit 2, the first entry was HAK trip folder October-December 1972. Do you recall whether your testimony was that you did not know the basis for that access? A. I do not know the basis for that specific access, no.

Q. Do you know whether it related to foreign policy or [45] national security needs? A. Since I don't know the basis for the specific access, I could not characterize it except to say that a trip abroad by the assistant to the president for national security affairs, I would think would almost have to relate to foreign policy or national security matters.

Q. Do you know whether Mr. Rodman's pulling the file labeled HAK trip folder October-December, 1972,

was in connection with a trip abroad? A. I do not know specifically.

Q. So then you do not know on that entry whether it pertained to national security and foreign policy needs? A. I personally do not know.

Q. All right. Is there any entry on Plaintiff's Exhibit 2 which you know the basis for the entry apart from the Church Committee entry? A. Again let me clarify. Where I specifically know what document was being sought and for what specific purpose over and above the review of it in the formal work of the – of Mr. Kissinger's office? Is that your question?

Q. Other than your judgment other intuitions as to why a particular document might be – might have been pulled, do you know specifically where any of these entries were made [46] and why the documents sought were being searched for? A. As I mentioned earlier, I do have specific knowledge of the search for the 1969 study on Thailand. I was personally involved in that. I do have specific knowledge of the Church Committee requests although in this particular log entry an attempt to identify paper requested by Church Committee, I don't know what that specific purpose was. But I do have knowledge of the Church Committee requests.

I do have knowledge of the FOIA requests. Here again the specific log numbers, I have not looked up.

Q. Do you consider the FOIA requests as pertaining to NSC needs for national security or foreign policy affairs? A. To the extent that the material being requested is material of a foreign policy or national security nature, yes, I do.

Q. Were those searches for in connection with NSC needs other than the decision process on making them available pursuant to the FOIA request? A. This entry would indicate that they were searched for for the specific reason of responding to the FOIA request.

Q. Is it fair to say that the example of NSC needs or access for – for access to the Nixon Administration material which is not in your affidavit at paragraph 10 limited to [47] Presidential as opposed to institutional material needs thought perhaps to arise in the future and not examples of what has occurred in the past? A. Could you read that back, please?

(The record was read by the Reporter.)

MR. GOLDBLOOM: I object to the form of the question. I think it ought to be restated. I am not sure I understand it.

BY MR. MORTENSON:

Q. Are the examples in your affidavit as pages 11, 12, 13, 14, examples of needs that may arise in the future as opposed to examples of those occasions that have negated NSC access to date? A. I would say they are both.

Q. Which are both? A. The examples in paragraphs 11, 12, 13 and 14, the need for material in these categories has occasioned our keeping copies of certain of the President Nixon materials, making copies and keeping those copies in the west basement. We have referred regularly to those copies and we would anticipate doing so in the future.

Q. Do you know what copies there are of Nixon presidential materials in the west basement? [48] A. The materials that I have described generally in these four paragraphs, materials on those four subjects. I know, for example, that there are copies of the briefing books prepared for the president's trips, some of Mr. Kissinger's trips and copies of some of the memoranda of conversations which took place on those trips.

The originals of those have been moved into the vault in room 207 but as I have indicated in here, we have maintained copies of some of this material.

Q. So the entry on Plaintiff's Exhibit 2 which we talked about I believe on page 3 stating additional copies of NSC materials for Nixon's files, that does not, then, indicate that all of the copies of Nixon presidential files are in the vault? A. As I have described in paragraph 15 of my affidavit, I have said we have retained copies of a limited number of those documents most often required in the White House office to be of assistance to the President.

It is those documents which I had described, I am describing. Those documents pertain to these four subjects.

Q. Do you know from your own knowledge or your discussions with Mr. Skancke the occasions you have had to review the Nixon Presidential files in connection with the Arab Israeli [49] dispute and the attempts to bring about a lasting peace in the Middle East? A. I would not know from his conversations with those two gentlemen. These documents I mentioned are maintained in the White House Offices of Mr. Kissinger. they are maintained by his immediate staff. I do know from conversations with them over a period of time that he has used that material out of those files.

Q. Is that segregated from his own files? A. Yes.

Q. And when did you discuss this with his secretarial staff? A. With his secretarial staff?

Q. Yes. A. This particular question?

Q. His gaining access to the Nixon Presidential files that are maintained over in the west wing of the White House? A. I have not discussed this with his secretarial staff. Under the normal circumstances, this material would be identified and obtained for him by either Mr. Rodman or Miss Troia.

Q. You have discussed this with them? [50] A. Not with Mr. Rodman recently although I have discussed it with Mr. Rodman in the past when we have been engaged

in searches for material. It discussed it with Miss Troia to confirm my understanding of what was in those files.

Q. Is it fair to say that your statement in paragraph 10 about the government, current government business negating access to Nixon Administration materials maintained in the vault in room 207 does not go to paragraphs 11, 12, 13 and 14, which you have described as being occasions in which people have had access to the copies maintained outside the vault? A. One of the reasons for maintaining the copies of some of this material at the time the originals were moved into the vault was based on the fact that we had had occasion to go into the originals of this material on several occasions during the period before the formal physical transfer of all the originals actually took place.

We made copies of that material which we had experienced having the most reason to need.

Q. Let's talk about the August 9, 1974 transition between the Nixon and Ford administrations as it pertained to the NSC. When you learned of President Nixon's resignation, what action did you take or to your knowledge did any member of the NSC staff take concerning the deposition of any of the [51] files maintained by the NSC? A. At the moment we learned of the resignation, we took, to my knowledge, no specific action at that time. Although there were discussions among those of us who have responsibility in this area as to how we should be thinking about the future and how we should proceed in the future, there was no specific action taken.

The instructions on the separation of the files came to us later. I cannot recall who actually signed the memorandum at the White House. It was a general instruction to separate, to be sure that there was no comingling of the period of President Nixon's administration and the period of President Ford's administration and to separate these things and to remove them and segregate them.

It was on the basis of those instructions that we began the process of segregating and boxing the material of the Nixon administration.

MR. MORTENSON: I would like marked for identification Plaintiff's Exhibit 5, a memorandum – a document labeled August 9, 1974, memorandum for the White House staff.

(The document referred to was marked Plaintiff's Exhibit Number 5 for identification.)

[52] MR. MORTENSON: For counsel's information, the Plaintiff's Exhibit 5 is a copy of a Jerry Jones memorandum to members of the White House staff which I believe all counsel have had copies of in the past.

MR. ANDERSON: When you asked for Mrs. Davis' deposition, you indicated that your questioning would take about 45 minutes and furthermore, it had been my assumption that it was related to her affidavit which is the only basis on which she should be questioned in this proceeding.

It seems to me you are going far afield of that and that Mrs. Davis is a very busy person. I would ask that you stick to the affidavit.

MR. MORTENSON: Counsel, I do intend to stick to the affidavit and I am appreciative of Mrs. Davis' very busy schedule and the responsibilities that she carries. I appreciate her being here tody. The basis for the introduction or the use of this memorandum is that Mrs. Davis' affidavit states that there has been a continuing need for access to the Nixon Presidential materials in the recent past.

She has described for us the mechanism by which the materials have been segregated. She has told us that she received or that the NSC received a memorandum shortly after President Nixon resigned talking about how to segregate the [53] materials. I would like to ask Mrs. Davis whether this memorandum appears familiar to her

as perhaps the memorandum which she received which described the packaging of the Nixon materials.

THE WITNESS: I am familiar with this memorandum. It is my recollection that this was not the only memorandum that was circulated on this general subject, however. This memorandum I do recall. It was the basis on which we began the segregation of the files so there would be no intermingling of the files.

BY MR. MORTENSON:

Q. In the process of your segregating, did the NSC staff make copies of any of the materials that were being segregated? A. Yes. As I have indicated, we made copies of certain materials primarily in these four substantive categories that I have indicated in my affidavit. We may have made copies of other material. I cannot say this for sure, although I know that we did locate copies of some of the material later on.

I believe there were copies that we had already had available. I don't think we made any copies of that material. We then subsequently transferred those copies into the valut so as to be in compliance with the order.

Q. In recalling the Jerry Jones memorandum of August 9, [54] 1974, are you familiar with the fact that it states "of course, some Nixon administration files may be needed for future reference. These files should be duplicated and placed with all other papers accumulated after noon today which constitute a new set of files for President Ford." A. Yes. It was under that provision that we did what copying we did.

Q. Is it fair to say then that at the time President Nixon resigned and then shortly thereafter when the staff received instructions to begin segregating the Nixon materials, that members of the NSC staff made a judgment concerning their future needs of NSC related materials which would otherwise be packaged among the Nixon

materials and made copies of those for their future use. A. I am sorry. Could you read that again, please?

(The record was read by the Reporter.)

THE WITNESS: It is fair to say that judgments could have been made as to what material we might continue to need. I can't say whether there was – these documents were copied at that time or whether existing copies of the documents possibly maintained in working files were retained.

I can't say whether this negated a copying of ali those documents at that time. I would rather doubt it. I would think [55] that in some cases copies might have been kept in individual working files.

Q. In any event the staff members of the NSC were under instructions to make copies or retain copies of what they felt for future reference. A. I would not say that would extend to the individual members of the staff. We try very hard to keep to an absolute minimum individual files of documents. We encourage and with some success, that individual officers keep the absolute minimum of working files and that they rely on the material in the secretariat so that we would not encourage our own staff members to duplicate copies of materials that were already available in the secretariat.

As I say, in these four examples I have given, these have been issues that have involved Mr. Kissinger and which involved President Nixon and now involve President Ford directly. This material is kept in the White House primarily for his use.

Q. Well then, is it fair to say that the NSC was under instructions along with the rest of the White House staff at the conclusion of the Nixon administration to retain copies of things which they felt would be necessary for future reference? [56] A. To the extent of that paragraph there, yes.

MR. KRULWICH: Do you have any idea how much

longer you are going to be?

MR. MORTENSON: I would say another 45 minutes.

MR. ANDERSON: You indicated to me last night that your direct examination would take 45 minutes.

MR. MORTENSON: My estimate which I gave to you yesterday morning again was based on having read the affidavit which you provided us the previous day. It was based upon solely my judgment of what was contained in the affidavit and the basis for challenging that. Since that time through discussions with various people, there are additional bases for challenging this affidavit.

I think that there has been no repetition throughout this questioning so far and that none of the areas that I intend to get into in the future, all of which are related to this affidavit, will repeat what I have gone through to this point.

It is very vital to the arguments in this case to establish the credibility and the substance of the Davis affidavit. I believe that I have the right to probe into these in this deposition. This is the only deposition that we have requested of any of party witnesses.

[57] MR. GOLDBLOOM: Off the record.

(Discussion off the record.)

BY MR. MORTENSON:

Q. Mrs. Davis, have any of the documents contained among the Nixon Presidential NSC materials been produced to any person under the Freedom of Information Act? A. No.

Q. In paragraph 8 of your affidavit you state in the second sentence "succeeding presidents, their staffs and NSC staff acting on their behalf, are able to have access to these foreign policy statements of previous administrations through the various presidential libraries which have been established after the President has left office.

During President Nixon's term, as in other administra-

tions, the NSC staff had occasion to use the non-institutional policy documents of previous administrations.

Is that statement based upon the information reflected in Plaintiff's Exhibits 3 and 4?

A. Yes. These are specific examples of occasions where we have had need to go to the Presidential libraries.

Q. Is that the basis for your statement in paragraph 8 that I just quoted? A. Yes. I should say, however, that we did not identify [58] in this particular document the specific titles of material reflected in these statistics. Generally it is the basis for that statement.

Q. From the exhibits 3 and 4, can you describe in general terms the nature of the access reflected in those documents? A. In some cases I can, yes. Let's take item number 2. The Murphy Commission for studying the organization of the executive branch asked for the preparation of several case studies. One of the researchers who was requested to prepare a case study was Richard Neustadt. He was asked by the Murphy Commission to review a report which he, Mr. Neustadt, had prepared for President Kennedy on a particular foreign policy issue, the title of the report was "Skybolt and Nassau."

The document was classified. There were no copies that we could locate anywhere in our own material. We were asked by the Murphy Commission and by Mr. Neustadt to see if this material could be declassified to the extent that it could be used in this case study.

We did obtain a copy from the Kennedy Library. We did review it and again made a determination then at that time that it could not be so declassified.

We received subsequent requests from Mr. Neustadt under the Freedom of Information Act for the declassification and [59] release of the study. We subsequently reviewed the document again and agreed to the declassification of portions of the document, but not all.

We released an excised version of the report to Mr. Neustadt.

Q. Did you handle contacts with the Kennedy Library in order to regain possession of that document? A. I personally did not.

Q. Do you know who did? A. It was done by – I don't know the individual. It done by the document control section of the NSC secretariat.

Q. Was that document under any other restrictions other than security classifications? A. I do not know the terms of the access at the Kennedy Library other than the security classification.

Q. Can you describe the purpose for any of the other accesses listed on Plaintiff's Exhibit 3? A. I think the third, the document identified in item number 3 – and I must say that on security grounds I cannot go into the specific nature of the study – but it was a document which was requested both by the Murphy Commission and subsequently by the Rockefeller Commission.

We again were not able to locate a copy in our own material [60] and we went to the Kennedy Library to obtain a copy of the material.

The ultimate disposition of that particular report, I am not familiar with since much of the Rockefeller Commission material was handled in other places. I am not familiar with the ultimate disposition but I do not – we obtained a copy from the Kennedy Library.

The fourth items relate to the State Department publication called Foreign Relations of the United States.

This is a series of historical volumes which contain the official history of U.S. foreign relations. They contain both a narrative and a text of basic source material documents.

The preparation of these volumes runs several years behind obviously. Over the past roughly five or six years the State Department historians have been working on

the volumes since 1947 and subsequent years. In other words, the volumes for the years after the creation of the National Security Council in 1947.

So for the first time the – some of the NSC material and some of the related presidential material has been requested for publication in these foreign relations volumes. This is the reason for this particular entry. When we have been requested to review certain materials, either NSC or Presidential [61] for publication in those volumes, we have had to go to libraries to obtain copies.

Q. Is what you are testifying to that the Library in connection with the request for making available such documents has requested NSC staff members to come down and review for declassification purposes? A. This is not the Library's requesting it. In item 4, it is the historians in the State Department who are requesting us to review the material for possible declassification and publication.

The items in item 5 are requests which have been received by the Presidential Libraries from scholars, what have you, for material that is in the libraries. These requests have then been referred to us by the archives for us to review the material.

Q. Do you know whether any access listed on Plaintiff's Exhibit 3 involved access to materials under restrictions as to access other than security classifications? A. I do not know.

Q. In paragraph 3 of your affidavit, you state "in 1969 President Nixon revitalized the machinery of the NSC and President Ford has affirmed a commitment to maintain the NSC as the formal structure for foreign policy decision making."

[62] Is it fair to characterize the NSC's functions under President Nixon as more extensive in the foreign policy making field than that of his predecessors, Mr. Kennedy and Mr. Johnson?

A. It is the use of the NSC institutional mechanism was much greater under President Nixon than it was under President Johnson.

Q. Has that resulted in a larger volume of institutional materials being generated during the Nixon period? A. Yes.

Q. Would that then reflect that in the institutional file there would be a larger number of national security study memoranda and national security decision memoranda than the period relating to the Johnson and Kennedy? A. The National Security study memoranda and decision memoranda are exclusively properties of the NSC system since 1969. There are more of these documents in the institutional files for the Nixon period than there were of the comparable documents during the preceding administrations, yes.

Q. Because of the Nixon revitalization of the NSC formal foreign policy machinery, is it fair to state that presently in the NSC institutional files, there is a more complete record of NSC foreign policy making during his administration than what is presently available to you under [63] the Johnson and Kennedy administrations? A. There is a more complete record in the institutional material for the Nixon years because more of the larger foreign policy questions were considered through the NSC mechanism, yes. That is correct.

Q. Do you know whether Dr. Kissinger had a copy in his own files of the correspondence between President Nixon and President Thieu of South Vietnam? A. I do not know. If I may just refer, however, to this item in the log of access for April 4th, it appears that there was an entry into the vault for the purpose of identifying or retrieving some of this Presidential correspondence on Vietnam.

I do not know of my own personal knowledge whether Mr. Kissinger has had copies of that material. I know

now, however, that copies of those exchanges are maintained in one of the safes in the west basement in Mr. Kissinger's office, in the west basement in the White House in connection with this material that I have described here in paragraph 13.

Q. How do you know that that is the case now? A. I had occasion – I do not know it is the case as of this moment. Approximately a month ago, possibly six weeks ago, I had occasion to go over and look at some material from [64] that file and I personally saw at that time copies of this.

Q. This is in Kissinger's own file? A. In the – yes, the safes which contain this material that is maintained for Mr. Kissinger in the west basement of the White House, copies of some of this material which I have described, –

Q. You don't know whether he had that copied from August 9, 1974 or not? A. I do not.

Q. Can you explain for the record what MEMCONS are? A. MEMCON is an abbreviation for Memorandum of Conversation.

Q. Where are those stored? A. Depending on their nature, they can be stored in the Presidential files maintained by the NSC in the west basement of the White House. Others may be stored in some of these safes which I described here, as Mr. Kissinger's material. Certain others, now that Mr. Kissinger is Secretary of State, certain other memoranda of conversations would be stored in the State Department.

Q. If you received a MEMCON of – strike that. If you received a MEMCON of a discussion in which President Ford and Dr. Kissinger participated who would make the [65] decision on where that document ought to be filed? A. It would depend on the nature of the discussion. If it were a particularly sensitive discussion, the decision would probably be made by Mr. Kissinger or by General Scowcroft. If it were a discussion which was somewhat less sensitive, I might make the decision.

Q. And what criteria would you use in determining whether to put it among the Presidential NSC files or the institutional NSC files? A. I can't imagine any case where we would put a memorandum of a presidential conversation in the institutional NSC files. They would always go into the Presidential files.

Q. Why is that? A. Because they are not institutional business. Our institutional files relate specifically to those issues which have come through the NSC mechanism which have been considered in the NSC or in a subgroup of the NSC or have otherwise been related directly to the institution of the national security program.

We do not consider presidential meetings with foreign leaders as the institutional business of the National Security Council.

Q. What about Dr. Kissinger's meetings with members of [66] other governments?

Where would that be found?

A. That would be found in the Presidential material rather than institutional material.

Q. Would Dr. Kissinger have a copy of that in his own files, do you know?

MR. GOLDBLOOM: I would like clarification of that question. There is an assumption that there is a distinction between presidential files and his own files for purposes of that question. If there is no distinction, I think it ought to be clarified.

BY MR. MORTENSON:

Q. Does Dr. Kissinger maintain his own files separate from the institutional files and the presidential files maintained by the NSC? A. In certain areas, I believe he does. I am not personally involved in any of the personal files that might be maintained by his own immediate people.

Q. If Dr. Kissinger had a MEMCON prepared of a meeting he had with a member of a foreign government

or if he received a copy of a MEMCON prepared of a meeting of – with President Ford or previously President Nixon, you would not know whether he maintained a copy of that in his own files? [67] A. I would not know – in his own files as distinct from a presidential file?

Q. Yes. A. I do not know.

Q. Do you know where you would find a memorandum reflecting – a MEMCON reflecting troop offset discussions? A. MEMCON with whom?

Q. A MEMCON between an assistant to Dr. Kissinger and a member of a foreign government. A. It would probably be filed in the presidential files. I cannot imagine an instance where it would be filed in institutional files.

Q. If a decision were made during the course of a conversation, where would that decision or agreement or understanding be located? A. If the decision were made in the form of a national security decision memorandum, it would be located in the institutional files since it would be a formal NSC document. If it were maintained – if the decision were reflected in a document other than a national security decision memorandum or a comparable official institutional NSC paper, it would be maintained in the presidential files.

Q. On President Ford's trip to Europe on which he is [68] presently abroad if there is an issued statement of principles, where would that be found? A. You mean a public statement?

Q. A public statement of principles. A. It would probably be filed in the White House central files which is a repository for unclassified material or public declarations. If it were an unclassified document, it would probably be found in the White House Central files. Now in addition I am sure that we would maintain convenience copies in our own location of an unclassified document.

Q. In your institutional files? A. Probably, yes.

Q. What about a communique that was issued? A. A public document?

Q. A public communique? A. It would not be maintained in NSC institutional files.

Q. What if the agreement reached was not reflected in a public document? A. It would be maintained in the institutional NSC files. It would be maintained in the presidential files.

Q. Where would you file a Nixon to Kissinger or a Kissinger to Nixon memo discussing proposals for the first [69] visit to China by Kissinger? A. Because of its extreme sensitivity, I would expect that – let me go back. It would certainly not be found in the institutional files. It would be filed in the presidential files. It would obviously in the early days have had some special protection because of its sensitivity.

But it would be filed in the presidential files as opposed to the NSC institutional files.

Q. Would it be filed anyplace else? A. Not that I know of.

Q. If President Ford enters into an understanding of any nature with a leader of a foreign state while he is abroad, will members of the NSC staff be made aware of that? A. Do you mean any member of the NSC staff?

Q. Yes. A. It is hard to say. I would assume that the substantive officer on the NSC staff who is dealing with the particular area of responsibility would be aware of any agreements or arrangements that have been reached on the trip, yes.

Q. Is that a senior staff position when you refer to a substantive officer? A. Yes.

[70] Q. Would he maintain a file of his own?

MR. ANDERSON: I am going to object to this to the extent that it does not have to do with the Nixon Presidential materials which are the subject of this suit.

MR. MORTENSON: We are trying to establish the mechanism for filing between presidential and institutional which is the subject of the affidavit submitted by the government defendants.

MR. GOLDBLOOM: I think you ought to add to that. When you say – that question needs to be clarified because it is not clear whether you are claiming that particular file when you say he maintains a file of his own if such a senior staff officer of the NSC maintained a working file in his office comparable to the type of information that you just proposed to the witness.

I think it ought to be clear what your position is with respect to what you claim in this litigation as far as presidential materials are concerned?

MR. MORTENSON: Our position would be that to the extent it is not an institutional document of the NSC, that it would be the subject of this litigation. The relevance of the question is that if a staff member maintained that in his files and had it there at the time the administration [71] changed, according to Mrs. Davis' testimony, the NSC received the Jerry Jones memorandum saying that copies should be maintained of things that they thought they would need for future reference.

My question is would a staff member have mong his working files or otherwise a copy of such an understanding?

THE WITNESS: It is possible that a senior staff member who had participated in either the preparations for a presidential trip or had actually accompanied the president on the trip would retain in his working files copies of some of the material that had been generated from the trip.

If I may I would like to return to a statement I made earlier, that as a practice, we discourage individual staff members from maintaining –duplicate, extensive duplicate files in their own offices.

Q. In describing your responsibilities in your affidavit, you state "My responsibilities include the review of the work of NSC staff members for responsiveness to the requirements of the president and his assistant for national security affairs, including organization, presentation, format and proper coordination."

In carrying out that function, do you perform any substantive [72] review of the materials?

MR. ANDERSON: What do you mean by substantive and –

BY MR. MORTENSON:

Q. Do you edit or make suggestions as to changes of statements that are contained in there? A. To the extent that the statements require clarification or that I believe the document should be – I believe a particular statement in it should be possibly reviewed by another officer on the staff, to that extent, I edit and may suggest changes.

I do not – I would not challenge a substantive judgment reflected in such a document by one of the senior substantive officers.

Q. Do you make any substantive judgments as to what should be included? A. I may. I again may go back to an officer and suggest the includsion of additional material, possibly additional supporting documents to be added.

Q. You state in paragraph 1 "I also serve as the principal point of contact on NSC matters for officers of the NSC members and other executive departments."

What is entailed in that?

[73] A. My office is the central source of information for the NSC members and other departments on the status of issues going through the NSC system. On the scheduling of meetings, the distribution of documents for such meetings, in addition to the institutional business, I also am the principal point of contact for such people as

the executive secretary of the Department of State on all issues both institutional and non-institutional in which the NSC staff and the office of the Secretary of State have reason to communicate.

In other words on documents which the State Department has sent us for, documents which we have sent the State Department and asked them to prepare responses, that sort of thing. My office is the central point of contact for that.

Q. Is it important for the NSC staff to have a knowledge of what occurs at cabinet meetings? A. Only to the extent that they relate to foreign policy matters.

Q. Are you aware that President Johnson recorded certain of his cabinet meetings?

MR. ANDERSON: I object to this line of questioning. It is totally irrelevant to this affidavit.

MR. SKANCKE: You represented that your deposition was going to take 45 minutes. I presume that you are going [74] to be able to stick to the ending time of 12:15 particularly in view of the utter irrelevance of the last thirty minutes.

MR. MORTENSON: I will consider that a time I would like to try to meet. I do not consider the questioning irrelevant, also.

BY MR. MORTENSON:

Q. Has there been any occasion during your tenure on the NSC staff for any staff member or any member of the administration to request access to tape recordings contained in the Johnson Library?

MR. ANDERSON: Didn't the witness testify that she didn't know about those?

MR. MORTENSON: She said he was not aware he recorded cabinet meetings.

THE WITNESS: Could you repeat the last question, please?

(The record was read by the Reporter.)

THE WITNESS: Not that I know of.

BY MR. MORTENSON:

Q. Has there been any cocasion to date to your knowledge for any members of the NSC staff or Dr. Kissinger or otherwise to have access to the tape recordings of the Nixon administration? [75] A. Not that I know of.

Q. You have stated that you prepared this affidavit in connection with discussions with Mr. Skancke and Mr. Murphy. What discussions did you have or knowledge specifically, specific knowledge, did you have in formulating the statement in paragraph 10 — I am sorry, paragraph 11. Without the ability to review our past understanding with the Chinese as reflected in these documents, the presidents would be inadequately prepared for his forthcoming meetings with the PRC officials. A. You are asking on what I based that statement?

Q. Yes. A. My own judgment.

Q. Is that also true with respect to paragraph 12 where you state "without ready access to the Nixon Administration materials, of which the basic negotiating papers are a part, our effectiveness would be seriously diminished." A. That statement was also made on the basis of my own judgment. As I mentioned earlier this affidavit was reviewed by General Scowcroft, Mr. Kissinger's deputy.

Q. You made the statement in paragraph 15, "indeed, we have retained copies of a limited number of those documents most often required in the White House office of the [76] President. Do you know how many copies have been — have — documents have been copied? A. I don't know the precise number, no.

Q. Do you have a general understanding of the number? A. We estimate that it would be about 25 file boxes. I should point out that some of this material is in briefing books. In other words, there will be a briefing book pre-

pared for a particular trip or occasion, so it would be a bulky document.

Q. When you describe the 25 file boxes, you demonstrated with your hands a box approximately how deep? A. The material is maintained in safes. The estimate for the rule, if I may use the word, is that each safe drawer, the contents of each full safe drawer may be filed in some standard cardboard file boxes which are two per drawer.

The boxes are I would say –

MR. GOLDBLOOM: I believe they are one cubic foot. The estimate is that one full safe drawer requires two of these boxes of material. The material that we are talking about is contained in about 3 safes plus 1 drawer, possibly 3 and a half safes.

We use the description of the boxes because the material that we had put into the vault we had also described [77] in terms of the number of boxes. So we use the box definition to be consistent.

Q. We are talking about on an estimated basis of 25 cubic feet of materials that have been copied? A. Approximately.

Q. Approximately how many boxes are there of Nixon Presidential materials in the NSC vault? A. We have moved over 352 boxes of presidential documents to the vault.

Q. Do you know how many of those contain copies of part of this that was returned to the vault? A. I don't know specifically.

MR. MORTENSON: No further questions.

MR. GOLDBLOOM: Can we take a two minute break?

MR. MORTENSON: Fine.

(Brief recess.)

CROSS-EXAMINATION

BY MR. ANDERSON:

Q. In paragraph 2 of your affidavit the first sentence the statutory function of the NSC is to advise the president with respect to the integration of domestic, foreign and military policies relating to the national security.

From the sketchy descriptions of documents in the [78] log which has been marked as Plaintiff's Exhibit 2, can you tell whether those documents would have related to those functions of the National Security Council? A. Not specifically, no.

Q. In a general way? A. In a general way, I can relate some of them to these functions, yes.

Q. Would they relate generally to the subject mattter of paragraphs 11 through 14 of your affidavit? A. Some of them would.

Q. Well – A. Specifically illustratively the item on page 4 July 10, 1975, box number 2 of the China material, this would relate to one of those paragraphs.

– Q. Would the log reflect access to Nixon Administration materials of copies which were not kept in the vault but were kept by the NSC staff for use ona more regular basis? A. No. This log pertains only to access to material in the vault.

Q. Was – strike that.

So that not all material used on a regular basis would be reflected in this log?

A. No. The material of which we have copies which are [79] maintained in the est basement of the White House, access to those copies would not be reflected in this log.

Q. At the time of Mr. Nixon's resignation was the National Security Council in a position to anticipate all of its future needs for his presidential materials? A. No.

Q. Can you tell us the position you held before you

became staff secretary of the National Security Council on June, 1970. A. From March 1969 to June 1970 I was detailed to the NSC staff from the Department of State to organize and head a new NSC secretariat. I became staff secretary in June of 1970 on the departure of the officer who had been staff secretary.

Prior to March, 1969, I was an employee of the Department of State and I still am an official employee of the Department of State. I am detailed.

Q. When did you begin your employment with the Department of State? A. In 1946. My entire career in the State Department has been in the executive secretariat of the Department of State. I have held several positions starting with a very junior professional position. At the time I was detailed to the [80] NSC staff I was the Director of the Secretariat staff which is a group of foreign service officers who perform review and general staff functions for the secretary and the deputy secretary of state.

I was the Director of that staff.

MR. ANDERSON: I have no further questions.

BY MR. DOBROVIR:

Q. Mrs. Davis, as staff secretary, it is part of your duties to keep yourself informed generally as to the work of the National Security Council? A. Yes.

Q. And you do so keep yourself informed, isn't that right? A. Yes.

Q. So is it fair to say that the judgments which are made by you and which are stated in paragraphs 11 and 12 about Mr. Mortenson asked you are based upon that knowledge and that experience? A. They are.

MR. DOBROVIR: No further questions.

BY MR. KRULWICH:

Q. In connection with Exhibit 2 on page 2 there are

four references beginning April 4th, through April 9th, 1975. [81] Do these references all relate to Vietnam? A. Yes, they do.

MR. KRULWICH: Thank you. That is all.

REDIRECT EXAMINATION

BY MR. MORTENSON:

Q. At one point you referred to a term I believe it was substantitve officers. Who are substantive officers in the NSC staff? A. We have what we call – excuse me. I will have to go into a little bit of the organization of the staff in order to explain this. Is that what you want?

Q. Maybe I can narrow my question. A. All right.

Q. How many substantive officers are there? A. Approximately 35.

Q. Are these people assigned to work on specific problems that arise in the course of the NSC activities? A. They are assigned to work in specific areas both on the work, the institutional work of the NSC and also the non-institutional work of the staff since the NSC staff supports both the institutional acivity and the non-institutional activity of Mr. Kissinger.

Q. Is the staff secreatary position a substantive [82] officer position? A. That is hard to say.

Q. Or is it an administrative officer position? A. that is hard to say. The work of the staff secretary requires substantive knowledge and a substantive background. The work itself to the extent that the staff secretary influences substance, the work is administrative. But it requires a substantive background.

Q. Do you carry substantive officer assignments in any specific area of NSC wokr? A. Do I personally?

Q. Yes. A. It depends on your definition of substantive. I am the – I have the primary responsibility on the staff for such things as the review of documents for de-

classifivation, which I mentioned earlier. For example, if we had two area officers who disagreed on the possibility for declassification, th eissue would come to me initially and I would try to either resolve the differences or I would express a judgment of my own.

If necessary we might carry the issue higher and I would indeed express a substantive judgment of my own.

Q. Apart from the declassification, would you carry any substantive officer responsibility on matters dealing with [83] China. A. No.

Q. On matters dealing with Russia? A. No.

Q. Any substantive area dealing with Vietnam? A. No.

Q. Any substantive area dealing with the Middle East? A. No.

Q. You have stated, I believe, in response to questions from Mr. Anderson, that it is clear to you from your knowledge of some of the categories and materials reflected in the log, Plaintiff's Exhibit 2, that they related to national security or foreign policy matters and that access to those documents could not be gained other than through entry to the vault, that thosy documents were not contained elsewhere? A. Excuse me. I do not know whether those documents were not filed elsewhere. I am assuming the fact that they entered the vault in order to obtain them, I am assuming they are not available elsewhere. I do not know of my own personal knowledge they are not available elsewhere.

MR. MORTENSON: I have no further questions.

RECROSS-EXAMINATION

BY MR. GOLDBLOOM:

[84] Q. I think you testified that you examined NSC documents for classification review, is that correct? A. For review for the purposes of declassification and publication, yes.

Q. Is it your responsibility to make judgments concerning the declassification of documents? A. It is not exclusively my judgment. We distribute the documents in question to various individuals on the staff depending on the area of concern. They provide me with their comments. If there is unanimity among the staff officers, I would under normal circumstances accept their judgment. If there is a difference of opinion between officers, I might discuss it with them, possibly try to work out an arrangement between the two, maybe come to some understanding.

If the difficulty persists, the difficulty persists, I would then probably prepare a memorandum to General Scowcroft or Mr. Kissinger outlining the differences, expressing the judgments of the other officers and expressing my own judgment.

Q. You would have an area where you would be exercising your own judgment. A. I would be expressing my own judgment, yes.

Q. What are the criteria – are there any formal criteria concerning the declassification of documents or materials? [85] A. Yes, the formal criteria derive more from the exceptions which are laid out in Executive Order 11652 and the Freedom of Information Act.

Q. Does that Executive Order contain information of impact on documents concerning the declassification? A. In the exceptions, yes.

Q. In exercising your judgement regarding declassification of documents, you would have to be making judgements in the area of national security and foreign affairs of the United States? A. Yes.

Q. To whom do you report in your position? A. I report directly to Mr. Kissinger or his deputy General Scowcroft.

Q. In the average or normal course of business, would you say – how often would you personally deal with

either Mr. Kissinger or General Scocroft? A. I would deal personally with General Scowcroft at least once a day. I would deal personally with Mr. Kissinger very infrequently, particularly now since he is also Secretary of State and divides his time between two posts.

I would have contact with him primarily in connection with attendance, my attendance at meetings of various NSC [86] subgroups which Mr. Kissinger chairs.

I attend many of those meetings.

Q. You have rady access to Mr. Kissinger when you need him? A. If I should need him, yes.

MR. GOLDBLOOM: I have no further questions.

REDIRECT EXAMINATION

BY MR. MORTENSON:

Q. You have described the declassification process and you have described to us if two staff members agreed on a matter of declassification, I would accept that and eeclassify the document? A. In almost every case, yes.

Q. If you disagree, you then would prepare a memorandum? A. It would depend. The Freedom of Information Act process requires two separate independent determinations. It requires an initial determination by one individual and it requires another individual to make the determination on the basis of an appeal.

So that in the – I am the person on the NSC staff responsible for the initial determination on a Freedom of Information request. In that case, if there were a split on the staff, I would be the one to sign the letter, whatever, [87] either agreeing or denying the request. On the appeal – excuse me. On Executive Order 11652 requests, which do not involve specifically the Freedom of Information Act, there is not this two-level distinction.

So in those cases, if there were questions, if there was

disagreement, at that point I might well refer them to higher authority. I would not, however, refer additional – an initial denial or granting of a Freedom of Information Act request to higher authority because that is required to be kept completely separate.

Q. If a Freedom of Information request were filed for a copy of the correspondence between President Nixon and President Thieu and it were referred to two staff officers dealing with Vietnam, if they disagreed as to the impact of that release upon relationships with South Vietnam or any other foreign country, how would you handle that dispute? A. Well first of all a request, a Freedom of Information request, for correspondence between President Nixon and President Thieu, we could not consider because under the terms of the court order, we would not have access to that material except for the conduct of ongoing business.

We have not interpreted responding to a Freedom of Information request as falling within that category.

[88] We would not have occasion to consider it.

Q. Let me put the same question in the context of a letter between Presidents Ford and Mr. Breshnev. If a Freedom of Information Act request sought access to such a letter and it was referred to staff officers dealing with matters involving Russia and they came back with disagreement on the impact, how would you handle that? A. Depending on the individual letter in question, it would be my inclination – and this is a little – I would have to know the specific letter, the contents of the letter. In any exchange of correspondence at the highest level, I would tend, I believe, to be more cautious about the release than I would on another less sensitive or less high level document.

Q. Does that mean you would refer it to someone? A. Not a Freedom of Information request unless it were a document which involved another agency. That would

not be the case of a presidential letter. But if the request should be for a document, for example, which had intelligence content, I might well refer it to another agency for expression of their view.

But not of a presidential letter, not in the initial stages.

Q. You described for us your contact with General [89] Scowcroft and Dr. Kissinger. What types of matters would you take up with General Scowcroft? A. Almost anything in my own range of responsibilities.

Q. Would you discuss with General Scowcroft the policies to be advanced in relationships with China? A. No.

Q. Would you discuss with General Scowcroft or Dr. Kissinger the policies to be advanced in the SALT negotiations and positions the United States should take vis-a-vis the Soviet Union?

MR. SKANCKE: We will stipulate that Mrs. Davis is not the Secretary of State.

MR. MORTENSON: I did not ask for that stipulation. The focus of my question – and I think they are quite obvious to counsel for the Intervenors – is to find out the range of Mrs. Davis' responsibilities.

BY MR. MORTENSON:

Q. Would you discuss with either General Scowcroft or Dr. Kissinger the policies to be followed or not followed with regard to Vietnam? A. No.

MR. MORTENSON: No further questions.

MR. GOLDBLOOM: We have none.

[90] (Whereupon at 12:40 p.m., the taking of the Deposition of JEANNE DAVIS was concluded.)

Supreme Court, U. S.
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No. 75-1605

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD NIXON, APPELLANT

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

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ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF THE FEDERAL APPELLEES TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees Administrator of General Services and the United States of America move to affirm the judgment of the United States District Court for the District of Columbia in this case.

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a) is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the con-

vening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F. 2d 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A notice of appeal (J.S. App. 109a) was filed on March 4, 1976, and the jurisdictional statement was filed on May 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C 1253.

QUESTIONS PRESENTED

Whether the Presidential Recordings and Materials Preservation Act is unconstitutional on its face as a violation of (1) the separation of powers doctrine; (2) presidential privilege doctrines; (3) appellant's right to privacy; (4) the First Amendment; (5) the equal protection component of the Due Process Clause of the Fifth Amendment; or (6) the Bill of Attainder Clause.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article IV, Section 3, clause 2 of the Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *.

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. IV) 2107 note and 3315-3324, is set out at J.S. App. 110a-123a.

STATEMENT

Appellant resigned as President of the United States effective August 9, 1974. When he left office

a large quantity of documents, files, and other materials, which had been accumulated by him and his staff during his term as President, remained in the government's custody (J.S. App. 7a-9a). These materials include approximately 42 million pages of documents. Appellant estimates that he personally prepared or reviewed 200,000 documents from this collection (J.S. 4). The materials also include more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the White House, and in appellant's offices in the Executive Office Building and Camp David (J.S. App. 40a). After appellant's resignation, government archivists began to collect these materials for shipment to California, in accord with appellant's instructions (J.S. App. 9a-10a).[1]

Before releasing any materials for disposition according to appellant's pre-resignation instructions, President Ford asked the Attorney General for advice about the ownership of the materials. The Attorney General concluded that, with the possible exception of one type of document, the materials were owned by appellant by virtue of historical practice and the absence of any statute to the contrary (43 Op. Att'y Gen. No. 1 (September 6, 1974); J.S.

[1] The tape recordings referred to by the statute apparently do not include the dictabelt recordings of private recollections that appellant made on occasion. Appellant now has full custody of most of these dictabelt recordings.

App. 124a-133a).[2] The ownership interest was not unqualified, however. The Attorney General informed the President that:

> Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity. [J.S. App. 129a.]

The opinion also stated that any ownership interest was qualified by exposure to court orders regarding the materials and based upon their unique nature (J.S. App. 132a-133a).

Following the President's receipt of this opinion the Administrator of General Services executed an agreement with appellant (J.S. App. 134a-138a).[3] Under the terms of the agreement, appellant retained title to all of his presidential historical materials but

[2] The Attorney General expressed no opinion concerning ownership of certain "permanent files." These files consist of materials traditionally retained in the White House from administration to administration, such as "White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action" (J.S. App. 131a, 132a). Appellant claims no rights to these materials in this action (J.S. 12).

[3] The agreement is reported at 10 Weekly Comp. of Pres. Docs. 1104 (1974).

agreed to donate a substantial portion of the materials to the United States at a future date so that they would "be made available, with appropriate restrictions, for research and study" (*id.* at 134a). While appellant reviewed the materials, they were to be deposited with the General Services Administration ("GSA") under the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and transferred to California, where they would be stored in locked areas. Neither appellant nor GSA could gain access to the materials without the consent of the other (*id.* at 135a).

The agreement provided that for three years appellant would not withdraw any original writing, although he could make and withdraw copies of any such materials. Appellant agreed not to withdraw any original tape recording of conversations in the White House or Executive Office Building until September 1, 1979, and to make reproductions of the tapes only with GSA's consent. After the initial three-year period, the agreement provided, appellant could withdraw any of the materials other than the tape recordings (*id.* at 136a). During this time appellant (or government archivists working under his direction) was to review the materials; those he did not withdraw would be donated to the United States, with appropriate restrictions on public access (*id.* at 138a). Following the initial five-year period, appellant would be entitled to designate any tape recording to be destroyed. All of the tape recordings were to be destroyed after ten years (September 1, 1984)

or upon appellant's death, whichever event occurred first (*id.* at 136a).

Implementation of this agreement was delayed at the request of the Watergate Special Prosecutor (J.S. App. 12a). Appellant then brought suit for specific performance of the agreement. The Special Prosecutor and Jack Anderson, a reporter, intervened; the case was consolidated with actions brought by the Reporters Committee for Freedom of the Press and by Lillian Hellman, both seeking to enjoin transfer of the materials and to gain access to them under the Freedom of Information Act, 5 U.S.C. (Supp. IV) 552.

While these consolidated actions were pending, Congress passed and the President signed the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. IV) 2107 note and 3315-3324. Section 101 of the Act directs the Administrator of General Services to obtain and retain possession and control of all of the presidential historical materials and tape recordings from appellant's administration. Appellant's agreement with GSA is abrogated (Section 101(b)). Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke * * *." Section 102(c) and (d) provides that appellant (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.

Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104(a)):

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
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> (2) the need to make such recordings and materials available for use in judicial proceedings;
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> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;
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> (4) the need to protect every individual's right to a fair and impartial trial;
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> (5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;
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> (6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and
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> (7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 104(b) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes can be disapproved by a resolution of either House within 90 legislative days of submission.[4] Section 105 provides for "just compensation" to any individual who may have been deprived of private property by the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed but has not yet submitted its report; it is not involved in this litigation.

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[4] The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed. September 11, 1975). The Administrator has not sought to enforce these disapproved regulations, and no party to this litigation claims any rights under them. See pages 16-17 and note 10, *infra*. The second set was withdrawn; the Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. S5290-S5291 (daily ed. April 8, 1976). The third set was submitted on April 13, 1976, and is pending.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. 105-63. The district court has enjoined the effectiveness of some of these regulations pending disposition of this appeal (J.S. App. 107a-108a).

One day after the Act became effective appellant commenced this action for declaratory and injunctive relief. The complaint sought the convening of a three-judge district court. The district court declined to rule upon the request; it proceeded to file an opinion in the consolidated cases growing out of appellant's agreement with GSA. *Nixon* v. *Sampson*, 389 F. Supp. 107 (D.D.C.). The Court of Appeals for the District of Columbia Circuit stayed entry of judgment in the consolidated cases to enable a three-judge district court to determine whether priority should be accorded to the present action (J.S. App. 139a-202a). A three-judge court was convened and allowed the other parties to the consolidated cases, who were not originally parties to this case, to intervene. The Special Prosecutor intervened and subsequently withdrew (see J.S. App. 16a-18a). Protected by the court of appeals' stay from any *res judicata* or collateral estoppel effects of the single judge's opinion in *Nixon* v. *Sampson*, *supra*, the three-judge district court independently considered appellant's arguments.

The three-judge district court rejected appellant's challenges to the facial constitutionality of the Act (J.S. App. 1a-106a). Noting that the regulations to implement the Act are not yet effective and that any challenge to the implementation of the Act is premature, the court limited its inquiry to the taking of the materials into the government's custody and their screening by government archivists (J.S. App. 3a-4a, 18a-31a). The court carefully considered and rejected each of the arguments appellant makes here.

ARGUMENT

Appellant seeks to raise a number of constitutional issues of central concern to the way power is allocated among the departments of our government and to the ability of the Executive Branch to formulate and carry out policies. For almost two centuries these issues, and others like them, have been left to be accommodated by the ebb and flow of political forces. Appellant challenges one of these accommodations in this case. The issues he seeks to raise, however, are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate.

Under the Act, release of presidential materials to any person outside the Executive Branch cannot occur until after "public access" regulations become effective establishing the rules under which any materials will be released. Appellant's complaints are addressed primarily to the possibility that "public access" regulations may be adopted that will not be sufficiently sensitive to his legitimate interests, and that, even if adequate regulations are adopted, their administration will adversely affect his legitimate interests. But the stark issues of constitutional doctrine that appellant presents are more theoretical than real. His concerns are not yet ready for judicial resolution. Since such regulations had not been promulgated at the time of the district court's consideration of this case, the only issue considered by the court, and available for review here, concerns the facial validity of the Act.

Because this litigation does not involve the regulations or any decisions made under them, appellant is limited to the argument that it is not possible to draft *any* constitutionally permissible set of "public access" regulations under the Act. The district court carefully considered that argument and correctly rejected it. There is no need for plenary review. Further judicial consideration of the underlying issues appellant seeks to raise should appropriately await issuance of final regulations.

1. a. The district court correctly rejected appellant's argument that the Act is an unconstitutional encroachment by Congress on powers reserved to the Executive Branch (J.S. App. 31a-35a). Far from invading the autonomy of the Executive Branch, the Act places the materials in the custody of the Administrator, an executive official responsible to the President, and provides that Executive Branch employees have access to the materials "for lawful Government use, subject to the [Administrator's] regulations" (Section 102(d)). See 41 C.F.R. 105-63.205, 105-63.206 and 105-63.302.

The Act also provides that the materials are to be made available for use in judicial proceedings, but such availability is expressly subject to any rights, defenses, or privileges which any person may invoke. Although the Act contemplates public access to some of the materials of historical value, it also recognizes the need "to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (Section 104(a)(5)) and to return other materials to appellant (Section 104(a)(7)). The Act thus ensures that there will be no disclosure of the materials to persons outside the Executive Branch in violation of any defenses or privileges asserted by appellant or the Executive Branch.[5] Cf. *United States* v. *Nixon*, 418 U.S. 683. Accordingly, the Act on its face does not violate the principle of separation of powers.[6]

b. Notwithstanding the Act's express protection of any rights and defenses of appellant and the Executive Branch, appellant argues that Congress lacks any power regarding the control, review, and disclosure of presidential materials (J.S. 16-17).

An Act of Congress does not invade the "autonomy" of the Executive Branch simply because it requires the Executive Branch to act in specified ways.

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[5] Section 105-63.401-2 of the Administrator's proposed public access regulations (submitted April 13, 1976) provides that the Senior Archival Panel of Executive Branch employees processing the materials shall, in limited circumstances, submit specific materials to a Presidential Materials Review Board for a determination whether the materials relate to abuses of Government power or otherwise have general historical significance. Cf. 122 Conf. Rec. S5291 (daily ed. April 8, 1976). Two of the four members of this Board (the Librarian of Congress and a nominee of the Council of the Society of American Archivists) are not Executive Branch officials. If this provision becomes effective, however, Section 105 expressly authorizes a judicial action to determine whether this minimal possible screening of materials by personnel outside the Executive Branch will offend the Constitution. There is no need for this Court to render an advisory opinion on that issue.

[6] But see note 10, *infra*.

The Constitution, which commands the President to "take Care that the Laws be faithfully executed" (Article II, Section 3), makes the President a servant of laws passed within the scope of a grant of power to Congress. Congress has frequently enacted measures providing for disclosure of documents in the possession of the Executive Branch. The Freedom of Information Act, 5 U.S.C. (Supp. IV) 552, the Privacy Act of 1974, 5 U.S.C. (Supp. IV) 552a, the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and the statutes regarding census data, 13 U.S.C. 8-9, and tax returns, 26 U.S.C. 6103, are a few of many such acts. Legislation of this sort has never been considered a facially invalid "invasion of the autonomy of the Executive Branch" (J.S. 16). Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255.[7]

Like the documents governed by these statutes, presidential materials are an appropriate subject for legislation. Since *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (No. 4,901) (C.C.D. Mass. 1841) (Story, J.), it has been recognized that regardless of where legal title lies, the government's interest in disclosure or non-

[7] Appellant's analogy of presidential materials to judicial drafts (J.S. 17) is not convincing. Each case reaching this Court is a separate event, and only the opinion of the Court is a precedent. But the conduct of the Nation's affairs by the Executive Branch is a continuous process, in which unpublished documents may hold the key to understanding and success. Procedures suitable for the records of Justices may be quite intolerable if applied to Presidents.

disclosure of presidential materials can take precedence over the desires of the authors.

Legislation regarding the materials from appellant's term as President is supported by the strong need for access by government officials to the materials as well as for general historical purposes. For example, in carrying out their duties, current officials have found it necessary to review portions of the materials concerning SALT negotiations with the Soviet Union, our relations with the People's Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation (affidavit of Jeanne W. Davis, dated July 25, 1975). Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here (affidavit of Jeanne W. Davis, *supra;* deposition of Jeanne W. Davis, taken July 30, 1975, pp. 64-69).

These presidential materials, which by and large were produced by public employees at public expense, were affected at their creation by a public interest (*Folsom* v. *Marsh*, *supra*) that gives the Nation important rights to them, even against the claims of appellant. The Act operates to enforce those rights pursuant to Congress' power under the Property Clause (Article IV, Section 3) to "make all needful Rules and Regulations respecting * * * Property belonging to the United States."[8] Moreover, as

[8] "[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress" (*Kleppe* v. *New*

a regulation of property affected by the public interest, the Act is constitutional without regard to whether appellant has a valid claim of ownership to the materials. To the extent that some of the materials may be determined to be the personal property of appellant, Congress has exercised its power of eminent domain and provided for whatever compensation may be constitutionally necessary.[9] Use of the eminent domain power to acquire and preserve the historical record is proper. *Berman* v. *Parker*, 348 U.S. 26, 32; *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668. Once the materials have been so acquired, the Property Clause confers ample authority for their disposition under the Act.

We would have greater pause if the Act hindered the Executive Branch in carrying out its functions under Article II of the Constitution. The Executive Branch has a right to "autonomy" in the sense that Congress cannot so hamstring its operations that its ability to function is frustrated.[10] Thus the Act

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Mexico, No. 74-1488, decided June 17, 1976, slip op. 6), and this Court has repeatedly given the Property Clause an "expansive reading" (*id.* at 9-10). See also J.S. App. 63a-66a n. 49.

[9] In light of the public interest that inhered in the materials at their creation, we do not concede that the Act would be a "taking" even if appellant could establish private ownership. The Act preserves appellant's access to the materials. Although it may diminish their monetary value to appellant, that is not always enough to constitute a "taking." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590.

[10] For that reason we believe that the provision for a one-house veto in Section 104(b) of the Act, is an unconstitu-

would be open to question if it so threw open the process of decision-making in the Executive Branch that it became difficult for the President to obtain candid advice from the other Executive Branch officials, or for those officials to speak frankly to each other. Cf. *United States* v. *Nixon*, *supra*, 418 U.S. at 705-706, 715; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-155. The Act does not create this sort of hazard, however; because it recognizes the importance of privacy and preserves existing privileges, and because the Executive Branch, acting through the Administrator, is entrusted with control of the day-to-day administration of the materials, we submit that the Act does not create such dangers of widespread breach of confidence that it is unconstitutional on its face.

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tional attempt by Congress to participate in the detailed administration of the Act. See also Article I, Section 7, clause 3. The position of the Executive Branch concerning one-house vetoes in general is explained in the testimony of Assistant Attorney General Scalia in Hearings on H.R. 3658 and H.R. 8231 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 1st Sess. 373 (1975). See also Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (1953). Cf. *Buckley* v. *Valeo*, No. 75-436, decided January 30, 1976, slip op. 113-117, 131-136 and n. 176.

But the provision for a one-house veto is not in issue here; the district court did not pass upon it. Although appellant challenged the Act on that ground in the district court (see J.S. App. 25a-26a n. 17) he does not press that challenge here, nor does he claim any right under the disapproved regulations.

2. The district court properly rejected appellant's claim (J.S. 20-25) that the Act violates the qualified privilege for presidential communications, which, as this Court recognized in *United States* v. *Nixon*, *supra*, 418 U.S. at 715, is founded upon "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."

That privilege is based upon the harm that could be done to the decision-making process by public disclosure of the materials. As such, it does not pertain to all presidential materials (although an incumbent President may have other privileges with respect to other presidential materials), and it does not pertain to disclosure to incumbent officials of the Executive Branch. See *Folsom* v. *Marsh*, *supra*. The business of government requires that the President and executive officials have access to the papers of his predecessors, and we submit that no claim of privilege can hinder this access.[11]

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[11] The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege in litigation against private parties. We do not share this doubt; we believe that a former President's materials concerning the communications, submissions and deliberations essential to the conduct of his office are presumptively privileged. The privilege attaches to the documents themselves. It is for the benefit of the republic, the President, and his advisers alike, and it does not dissipate upon a change of Presidents or even the death of an ex-President. The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President, and a court should recognize a privilege of this sort even if no individual asserts it.

Only appellant, officials of the Executive Branch in the conduct of their official duties, and archivists who, pursuant to regulations not yet effective, will screen and classify the materials, have access to the materials. No "public access" is imminent. Access by the archivists is not meaningfully different from screening by a court *in camera*; it poses no realistic danger of breach of confidence or inhibition of discussions among executive officials. See *United States* v. *Nixon*, *supra*, 418 U.S. at 706, 714-716; *Kerr* v. *United States District Court*, No. 74-1023, decided June 14, 1976, slip op. 10-11. That being so, the Act does not on its face infringe the presidential privilege that appellant is entitled to assert.

Difficult questions still may arise concerning particular screening techniques and eventual public access, but consideration of them is premature until the regulations have become effective. The opinion of the district court manifests great solicitude for appellant's rights. It observes that in some cases access even by executive officials to certain types of documents may be forbidden (J.S. App. 26a-27a n. 18) and that concern for appellant's rights must be "paramount" (*id.* at 22a); it suggests ways in which screening of the materials can be accomplished with a minimum of intrusion (*id.* at 29a-31a). There is no support for appellant's apparent belief that his legitimate interests will be overlooked when he seeks

judicial review of the regulations ultimately promulgated.

In any event, only a small portion of the 42 million pages of documents and more than 800 reels of tape in issue could be subject to a legitimate claim of privilege by appellant. The privilege would not attach to materials unrelated to the performance of executive duties.[12] *United States* v. *Nixon, supra,* 418 U.S. at 703-714. Appellant estimates that he personally prepared or reviewed only 200,000 of the documents. Even some of those materials are not privileged; the privilege applies only to communications originating in confidence and not yet disclosed to the public. Some of the materials have become matters of public record through appellant's voluntary disclosures and are no longer privileged. Most of the material therefore falls outside the scope of any recognizable privilege.

Finally, appellant cannot claim that the materials were created with the expectation that they would be kept privileged or private in perpetuity. Every President since Hoover has deposited most of his presidential materials in a library pursuant to the Presidential Libraries Act, 44 U.S.C. 2107 and 2108 (see J.S. App. 43a). Only a few presidential materials have been withheld. Each President or his

[12] Some materials unrelated to appellant's presidential duties may be subject to another privilege, such as attorney-client or husband-wife. But few of the documents would be subject to such privileges, and it is impossible to determine which these will be until the archivists have examined them.

representative has allowed professional archivists to screen the materials and to suggest appropriate restrictions upon access; appellant had planned to follow a similar course. The sheer bulk of the materials would make any other course infeasible (J.S. App. 72a, 83a n. 59). With or without the Act, then, eyes other than appellant's would screen most of the materials.

3. The district court correctly rejected (J.S. App. 67a-89a) appellant's claim that the Act unconstitutionally invades his personal privacy (J.S. 22-25). Appellant was, for the term of his Presidency, the quintessential "public figure." Cf. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265; *Kelley* v. *Johnson*, No. 74-1269, decided April 5, 1976. His voluntary decision to seek the Presidency relinquished any "privacy" interest in the way he conducted that office and administered the public trust. *Uniformed Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280, 284.

A former President may have a "privacy" interest in some of his documents, but that interest would pertain to only a few of the materials in issue here.[13]

[13] The district court believed that appellant's "privacy" interest in the materials is established and protected by the Fourth Amendment. That is not necessarily so. The materials were left in the government's possession when appellant resigned and have not been "seized" within the meaning of the Fourth Amendment. *Couch* v. *United States*, 409 U.S. 322, 335-336; *Burdeau* v. *McDowell*, 256 U.S. 465. The review of the documents may be a "search," but in light of the governmental interest in the documents and the fact that they were generated by governmental personnel, the ordinary standards of "reasonableness" would not pertain. There

Most of the papers were prepared or seen by others; many were circulated widely within the government. Cf. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976. Appellant himself prepared or reviewed relatively few of the documents. Portions of some of them have been disclosed or discussed in public and therefore are no longer private. *United States* v. *Dionisio*, 410 U.S. 1, 14; *Katz* v. *United States*, 389 U.S. 347, 351. Appellant expected to donate most of his materials to a presidential library, where they would be read by others. Appellant's principal purpose in making the tape recordings was to preserve the conversations for historical purposes (Deposition of Richard M. Nixon, taken July 25, 1975, pp. 72-73), a purpose that could be fulfilled only by allowing individuals other than appellant to have access to them.

Whatever "privacy" interest appellant may have in the remaining materials is outweighed by the strong public interest in their preservation. We have already discussed the need of officials of the Executive Branch to have access to the materials in order to conduct the affairs of state. The Act also ensures that materials of historical significance will be pre-

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should be no need to establish "reasonableness" (let alone to obtain a warrant) before personnel of the Executive Branch may examine documents created by the Executive Branch itself. Although the source of the "privacy" interest in the materials therefore is elusive, we assume *arguendo* in the following discussion that some constitutionally generated or protected privacy interest exists. But cf. *Paul* v. *Davis*, No. 74-891, decided March 23, 1976, slip op. 19-20.

served and professionally processed in order to make available an accurate historical record (J.S. App. 49a-52a), and it ensures that materials will be preserved for use in judicial proceedings (Section 102 (b)). Congress reasonably perceived that these and other legitimate public interests would be jeopardized if appellant had the sole right to screen the materials and to separate the "private" from the "public." [14]

Even when all of this is taken into account some irreducible residuum of privacy may be invaded. Congress took pains to establish a mechanism to mitigate the problems caused by this invasion. The Act acknowledges the need to give appellant "sole custody and use" of all materials not related to the abuses of power known as "Watergate" and not of general historical significance (Section 104(a)(7)). The

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[14] For example, during the time appellant had custody of the tape recordings an unexplained 18½ minute erasure was made in one tape sought by the Special Prosecutor. 9 Weekly Comp. of Pres. Docs. 1370, 1372 (1973); H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 127 (1974). During the hearings on the proposed articles of impeachment appellant issued transcripts of what he represented were the taped conversations. 10 Weekly Comp. of Pres. Docs. 450-458 (1974). After the House Judiciary Committee obtained the recordings it concluded that appellant's transcripts have "proven to be untrustworthy" and contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention * * *" (H.R. Rep. No. 93-1305, *supra*, at 205, 129). Congress perceived these and other discrepancies as raising questions about appellant's reliability as a custodian. That doubt further supports Congress' decision to entrust the task of screening to disinterested archivists.

initial screening will be conducted by disinterested archivists; screening of this sort, like submission of materials to a court *in camera*, does not create a significant invasion of privacy. *Department of the Air Force* v. *Rose*, No. 74-489, decided April 21, 1976. To the extent screening by the archivists is itself an invasion of privacy, the intrusion is attributable in part to appellant's practice of commingling public and private documents (see J.S. App. 63a). He could have established a separate file for truly personal matters, but did not; he should not now be entitled to claim that the statute is unconstitutional on its face because the archivists, "whose record for discretion in handling confidential material is unblemished" (*id.* at 45a), will be required to sift through private documents. Finally, as is the case with appellant's other arguments, more particularized claims can be made once the regulations have become effective. "Objections [appellant] now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass * * *" (J.S. App. 21a).

4. For many of these reasons, the court below also properly rejected (J.S. App. 89a-93a) appellant's First Amendment claim (J.S. 25-27). "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, *supra*, slip op. 58. This Court has recognized, however, that "particularly when the 'free functioning of our national institutions' is involved," the need for disclosure may outweigh the First Amendment interests. *Id.* at 60-61, quoting from *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 97. As we have discussed, the Act will allow public access only to those materials related to "Watergate" or having general historical significance. The initial screening of all the materials by disinterested archivists does not infringe appellant's First Amendment rights. The private knowledge of the archivists will not deter appellant from expressing himself in the future concerning public issues; it will not prevent other individuals from associating with appellant (J.S. App. 92a-93a).

5. Appellant contends that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment because Title I applies only to the materials from his Presidency (J.S. 28). There is nothing to this claim. Appellant is the only President to resign; this alone distinguishes him. And as the district court observed (J.S. App. 93a-94a), the presidential materials of all other recent past Presidents already are available in presidential libraries, the incumbent President needs his papers to carry out his duties, and the papers of future Presidents pose no immediate problem with which Congress must grapple. The classification established by Congress is rational and responds to the nature of the problem presented. Cf. *City of New Orleans* v. *Dukes*, No. 74-775, decided June 25, 1976; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489.

6. The Act is not a bill of attainder or of pains and penalties. It is hard to imagine how an Act of Congress expressly providing for "just compensation" for any property interest taken can be thought to be an imposition of "penalties." However that may be, there is no evidence that Congress acted with a punitive intent.

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation * * *.

Flemming v. *Nestor*, 363 U.S. 603, 614, quoting from *De Veau* v. *Braisted*, 363 U.S. 144, 160 (plurality opinion). The district court found ample evidence that Congress acted to protect the public interest by ensuring the preservation and processing of the materials (J.S. App. 100a-101a). Moreover, as the court below also noted, the Act's specific protections of appellant's right to purely personal materials negates the claim that the Act is a bill of pains and penalties (J.S. App. 102a). See *United States* v. *Brown*, 381 U.S. 437, 441-446.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1975

RICHARD NIXON,

Appellant

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
JACK ANDERSON,
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.,
LILLIAN HELLMAN, ET AL.,

Appellees

On Appeal from the
United States District Court for the District of Columbia

MOTION OF APPELLEE JACK ANDERSON TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee Jack Anderson moves the Court pursuant to Rule 16 to dismiss the appeal or affirm the judgment below on the grounds that the questions raised by the appeal are so insubstantial and the decision of the court below is so clearly correct as not to need further argument.

STATEMENT OF THE CASE

Appellant, the first President to do so, resigned the Presidency on August 9, 1974. Remaining in the White House, the Executive Office Building and various facilities of the General Services Administration and passing into the custody of appellant's successor were some 42,000,000 documents and 880 reels of tape, the overwhelming bulk of which constituted records of the conduct of the government of the United States from January 20, 1969, to August 9, 1974.

On December 19, 1974, the President signed into law the Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695 (1974) [appellant's Jurisdictional Statement (J.S.), App. D]. Appellant sued to enjoin the operation of the Act and a three-judge court was convened. Voluminous evidence, including the oral deposition of appellant, was presented, briefs were filed, oral argument was heard and the court rendered the decision appealed from on January 7, 1976.

Appellant's complaint was a grab bag of constitutional claims premised on assumptions about what might happen after completion of the archival processing provided for in the Act, assumptions that, in essence, papers and tapes relating to matters of no public importance and relating to purely private concerns would be made public. Appellant claimed that the entirety of the 42 million documents and 880 reels of tape were his property and also claimed that they were affected with constitutional immunity from the reach of the law, under either the doctrine of the separation of powers, executive privilege, the Fourth Amendment's guarantees against seizure, the constitutional right

of privacy or the First Amendment's protection of political association. Appellant also asserted that the Equal Protection clause prohibited application of the Act to the records of his Presidency because no such act had been in effect for his predecessors, and asserted that as applied to the records of his Presidency the Act was a bill of pains and penalties.

THE DECISION BELOW

The court below declined to consider appellant's claims on the basis of appellant's assumptions. The court limited its inquiry to the immediate effects of the Act, not the hypothetical and speculative possibilities of what might be proposed to be released after the archival processing of the documents and tapes would begin. The court therefore limited its inquiry and its ruling to

> the injury to constitutionally protected interests of Mr. Nixon that is allegedly worked by the taking of his presidential materials into custody and their screening by government archivists.

App. 3a-4a. The court recognized that the regulations to be adopted pertaining to public access and the return to appellant of personal materials without any public access might eliminate any intrusion into constitutionally protected rights. App. 26a-28a.

The court below then examined each of appellant's constitutional claims and found no merit or substance in any of them.

Executive Privilege. Although the court found it difficult to find any standing in a former President to raise a

claim of executive privilege, App. 35a-40a, it did not place its decision on that ground. Instead, the court held that any interest appellant might assert was too weak to rise to constitutional heights because he had little, if any, basis to claim a privilege founded in confidentiality of Presidential communication in documents (41,800,000 out of 42,000,000) which he never saw, App. 40a-41a; because many of the 200,000 direct communications were outside the scope of Presidential duties and therefore of executive privilege; because the intrusion by archivists (themselves employees of the Executive branch) into any expected confidentiality would be "minimal" in view of the rapid erosion of any such expectation as time passes and Presidential advisors publish their memoirs, App. 41a-44a, and in view of the weakness of any such expectation given the known, uniform practice of prior Presidents to consign materials in their possession to the same government agency and its archivists, App. 43a-46a.

Separation of Powers. As with the claim of executive privilege, the court found that whatever shred of interest appellant might still retain under Article II of the Constitution and constitutional separation of powers was far outweighed by the nation's interest in preserving the materials for history; its interest in using them for the continuing processes of government; its interest in ensuring their availability as needed in judicial proceedings, App. 46a-61a, and the reasonably perceived danger of leaving the decision respecting their preservation or destruction to appellant, App. 47a.

Privacy. The court found that on the record only "a tiny fraction" of the materials could be "reasonably expected to be private," i.e., of a character to invoke a

constitutional protection of privacy, App. 69a. It found that the minimal intrusion of archival processing for the purpose of returning that "tiny fraction" to appellant was reasonable, App. 75a-82a, less than the intrusion permitted and found lawful in other circumstances, App. 83a-87a, and indeed "the least intrusive manner in which to provide an adequate level of promotion of government interests of overriding importance." App. 87a-88a.

Right of Association. In response to appellant's claim of infringement of his First Amendment rights by injury to his political rights of association, the court below again noted that, like the materials that might be private, only a tiny fraction of the "great bulk" were involved and the intrusion of archival processing was minimal; and, like the materials relating to Presidential activities, appellant had already disclosed much. App. 89a-93a.

Equal Protection and Bill of Pains and Penalties. The court found ample ground for appellant to be treated differently from prior and future Presidents with respect to the records of his administration in the "adequate basis for concluding that [appellant] might not be a reliable custodian of the materials at issue." App. 93a-97a and 96a. It disposed of the claim that the Act was a "bill of pain and penalties" by pointing out that regulation and control of the processing of Presidential materials were not punishment, App. 101a, especially in light of the specific provisions of the Act giving unique procedural and access rights to appellant. App. 101a.

ARGUMENT

Appellant challenges the district court's refusal at this time to consider his hypothetical and speculative claims

(J.S. 21-22) and challenges the court's rejection of each of his constitutional claims. His challenge raises no substantial questions, and the decision below was clearly correct.

1. Appellant attempts by hyperbole to mask the lack of substance of his claims. He ignores the President's approval of the Act, and charges "Congress" with "purporting to control the . . . publication of a President's most confidential thoughts" and thereby asserting a power "to influence the internal affairs of the White House"; with "seizing . . . the materials of appellant's administration" and thereby making "an unprecedented invasion of the autonomy of the Executive Branch." J.S. 16. He charges that by the Act "Congress" asserts "dominance of the confidential, internal communications and files of a coequal branch." J.S. 17. He asserts that the Act is equivalent to making Presidential advisors' communications "currently open to public inspection." J.S. 19-20. He describes the Act as "authorizing government seizure of all the papers and effects of a man's life covering a five-and-one-half year period." J.S. 23. He claims that by the Act the nation did "summarily seize all records of the political activities and communications of a President." J.S. 26.

Of course, as the court below took great pains to point out, the Act does no such thing. It does no more than provide for archival processing of the records of the Nixon administration, the results of which will be to return all appellant's private records to him, unviolated by public access, while preserving for the government, for history and for the public the records that have traditionally been so preserved. App. 43a-46a.

Appellant's rhetoric must be read against the rapid shrinkage of the scope of his claim in the journey from the district court to this Court. In the district court, appellant claimed every one of the 42,000,000 documents that comprise the written record of his administration, App. 8a-9a and n. 1; App. 40a. In this Court, however, appellant claims only the 200,000 documents which he himself actually saw and the tape recordings of Presidential conversations. J.S. 4. Since appellant asserts that "for the most part that material has always remained segregated from the bulk of the items seized by this Act and is presently stored in approximately four small areas in the White House complex," *ibid.*, it is difficult to understand why appellant has not yet withdrawn his objection to the archival processing of the other 41,800,000 documents.

2. Appellant argues that the district court "should not have treated as premature the impact on Presidential advisors of *possible* public access" because "there is an unavoidable 'chilling' effect" on Presidential advisors. J.S. 21 (emphasis in original). He also argues that he should not have to challenge future archival decisions piecemeal. *Ibid.*

As to appellant's second point, there may well be nothing in those future archival decisions that will be subject to a non-frivolous challenge, and a court would be straying far from Article III to enter now into a hypothetical morass of infinitely variable future document-by-document decisions. As to appellant's first point, the Act postdates his administration and had no effect on his advisors, his successor approved the Act and appellant has no standing to allege a " 'chilling' effect" on future

Presidential advisors or advice. *Laird v. Tatum*, 408 U.S. 1, 12-14 (1972); *cf.* App. 89a n. 64.

3. The district court found "most troublesome" appellant's claim that archival processing would invade his privacy. Decisions of this Court announced after the decision below make the district court's rejection of the invasion of privacy claim not only less "troublesome" but clearly correct.

a. Independent processing of personal files to ensure that privacy is protected, contemplated by the Act, see App. 22a-25a, was approved by the Court in *Rose v. Department of the Air Force*, ____ U.S. ____, 44 U.S.L.W. 4503 (1976). The Court there adopted a balancing test to implement the policy of the Freedom of Information Act "to open public business to public view when no 'clearly unwarranted' invasion of privacy will result," 44 U.S.L.W. at 4512. The Court noted, in approving *in camera* judicial review to delete identifying details from files affected with a public interest,

> To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts (citations omitted).

Ibid. If anything, professional archivists are preferable to busy district judges to process records for the twin purposes of protecting privacy and opening "public business to public view."

b. The Court has now made clear that privacy interests that are inviolate for a private citizen give way when they are claimed by a holder of a public office and clash with a public interest related to that office. *Kelley v. Johnson*, ___ U.S. ___, 96 S. Ct. 1440 (1976). Appellant, of course, has rights of privacy "with respect to certain basic matters of procreation, marriage and family life," *Kelley, supra*, 96 S. Ct. at 1444, and *cf. Paul v. Davis*, ___ U.S. ___, 44 U.S.L.W. 4337, 4343 (1976). But when he assumed the Presidency, he gave up his absolute rights of privacy as one of "the citizenry at large," *Kelley, supra*, 44 U.S.L.W. at 1444, and the Act's provision for the use of archivists to cull out and return to him any purely private records is justified, indeed necessary and traditional for a President, even though it would not be justified for a private citizen. In short, the Act and the archival processing it provides "touch" appellant as a former government official with respect to the records of his tenure, *ibid.*, and he has no "legitimate expectation of privacy" in the "business records" of the conduct of his Presidency, for which he "can assert neither ownership nor possession." *Cf. United States v. Miller*, ___ U.S. ___, 44 U.S.L.W. 4528, 4529-30 (1976).

4. Appellant's assumption of office likewise reduces his right to First Amendment protection of political activities that are inextricably related to the conduct of such office. The right of free communication guaranteed in public streets and parks may be limited on government facilities, *cf. Greer v. Spock*, ___ U.S. ___, 96 S. Ct. 1211, 1217 (1976); an army officer must accept a restriction on First Amendment protections in relation to his responsibilities as an officer, *cf. Parker v. Levy*, 417

U.S. 733, 94 S. Ct. 2547 (1974), and civilian government employees must accept restrictions on their political rights, *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 93 S. Ct. 2880 (1973). As Justice Powell noted in *Greer,* such First Amendment rights "may be circumscribed when necessary to further a sufficiently strong public interest," as long as the infringement "is limited narrowly to the protection of the particular government interest involved," 96 S. Ct. at 1219, 1222 (concurring opinion). Justice Powell no more than echoed the unanimous holding of the Court in *Buckley v. Valeo,* ___ U.S. ___, 96 S. Ct. 612, 638 (1976), that

> [e]ven a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.

5. *Buckley v. Valeo, supra,* also decided after the decision appealed from here, confirmed the importance, as a public interest justifying possible limitations on First Amendment rights, of the need for public disclosure of facts relating to corruption and abuse of our political institutions to promote the general health of those institutions. This interest, the first listed purpose of the Act, § 104(a)(1), App. 112a, was relied on by the court below, App. 58a, *inter alia,* as justifying the Act's provision for archival processing in the face of the risk of distortion or destruction of records of "Watergate" should the materials have come into appellant's hands, App. 47a-48a.

In *Buckley* the Court upheld the Federal Election Campaign Act's campaign contribution disclosure provisions, in the face of the established principle that "disclosure, in

itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 96 S. Ct. at 656. The potential infringement of First Amendment rights by "compelled disclosure" was outweighed by governmental interests in which "the 'free functioning of our national institutions' is involved," *id.* at 657: to wit, the need to provide "the electorate with information" about political money, to deter corruption by "exposing large contributions and expenditures to the light of publicity" and to gather "the data necessary to detect violations," outweighed disclosure's potential effects of deterring contributions and making possible harassment of or retaliation against contributors. *Id.* at 657-58. The Court approved the disclosure provisions as "part of Congress' effort . . . to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." *Id.* at 662. As the Court noted, the legislation's purpose was "to limit the actuality and appearance of corruption," and was directed at preventing the reoccurrence of "such pernicious practices" as "the deeply disturbing examples surfacing after the 1972 election . . . .," 96 S. Ct. at 638. The Act challenged here provides for disclosure of the same collection of abuses for the same salutary reforming purpose. P.L. 93-526, § 104(a)(1); H.R. Rep. No. 93-1507, 93d Cong. 2d Sess. (1974) at 2.[1]

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[1] In *Buckley,* 96 S. Ct. at 638 n. 28, this Court referred to the Court of Appeals' catalogue of these abuses, at 519 F.2d 839-40 and nn. 36-38. The examples given there are but a few of the "Watergate" subjects, defined for the purposes of the Act by GSA in its proposed regulations, § 105-63.104(c), as the alleged acts within the purview of the Senate Select Committee on Presidential Campaign Activities or within the matters reported by the House Judiciary

(Continued)

Appellant's First Amendment associational interests affected by the Act are weaker than those found outweighed in *Buckley*. Unlike the FECA, the Act appellant challenges here does not require disclosure of and thus does not affect or inhibit appellant's present or future political associations. Any embarrassment that might result from the possible disclosure of his past political conversations as President after the archival processing provided by the Act, is far outweighed by the interest in informing the public respecting the abuses of our political institutions which the *Buckley* Court had before it in upholding the FECA's disclosure provisions.

CONCLUSION

There are no substantive questions raised by the appeal which have not been decided by previous decisions of this Court. The appeal should be dismissed or the judgment below summarily affirmed.

Respectfully submitted,

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[1](continued) Committee in its impeachment inquiry, H.R. Rep. No 93-1305, 93d Cong. 2d Sess. (1974). See also, in the legislative history of the Act, the reference to the scope of "Watergate" in S. Rep. No. 93-1181, 93d Cong. 2d Sess. (1974) and H.R. Rep. No. 93-1507, 93d Cong. 2d Sess. (1974) at 2.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, *et al.*,

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MOTION TO AFFIRM OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, *et al.*,

Pursuant to Rule 16 of the Rules of this Court, appellees The Reporters Committee for Freedom of the Press, American Historical Association, American Political Science Association, *et al.*[1] hereby move that the

[1]The Reporters Committee for Freedom of the Press is an organization devoted to promoting the First Amendment and freedom of information interests of the working press in all media. The American Historical Association is composed of approximately 18,000 scholars engaged primarily in the study, teaching and

[Footnote continued]

judgment and order of the district court be affirmed. The grounds for this motion are (a) that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument and (b) that further briefing and argument will substantially delay implementation of the important objectives that were recognized by Congress and the President in enacting the statute which is the subject of the appeal.[2]

QUESTIONS PRESENTED

The question in this case is whether the records of the conduct of the nation's highest executive office over 5-1/2 crucial years in the nation's recent history may be preserved and regulated by publicly accountable officials in accordance with publicly established rules, or whether these records must, despite efforts of Congress and the incumbent President, be turned over to the ex-President, a private person with no public accountability, whose

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writing of history. The American Political Science Association, which has approximately 17,000 members, is the principal professional organization in the United States devoted to research and education in the art and science of politics and government.

In addition to the organizations described above, the appellees represented in this motion to affirm include the following scholars and journalists: James MacGregor Burns (Professor of Political Science at Williams College and President of the American Political Science Association); Nat Hentoff (author and columnist); Donald Herzberg (Professor of Government and Dean of the Graduate School at Georgetown University); William Leuchtenberg (Professor of American History at Columbia University); Arthur Link (Professor of American History at Princeton University); J. Anthony Lukas (author and reporter); Austin Ranney (Professor of Political Science at the University of Wisconsin); and Clement Vose (Professor of Government at Wesleyan University).

[2]The opinion below has recently been reported at 408 F. Supp. 321.

sole discretion would control decisions as to their preservation, disclosure, nondisclosure or destruction. More particularly, the questions presented are:

1. Whether the doctrine of "executive privilege" or "separation of powers" subordinates the needs of the current administration, Congress, the courts and the public in the records of the Presidency to the desire of a *former* President to exercise sole custody and control over millions of materials that were produced or received by him and his staff in the course of discharging their public responsibilities.

2. Whether the fact that some of an ex-President's personal records are intermingled with a vastly greater quantity of records bearing on the performance of public duties and the exercise of governmental powers entitles that ex-President to exclusive personal custody and control over all such records, notwithstanding the fact that the Presidential Recordings and Materials Preservation Act guarantees that any intermingled materials relating to the ex-President's personal affairs will be returned to him as promptly as possible and will not be made public.

3. Whether the Presidential Recordings and Materials Preservation Act constitutes a bill of attainder or denies appellant equal protection of the laws.

STATEMENT

A. THE MATERIALS AT ISSUE

The materials covered by the Presidential Recordings and Materials Preservation Act (hereinafter "Presidential Materials Act") are, in large measure, the records of the conduct of the executive branch of the Government of the United States from January 20, 1969 to August 9,

1974. They consist of materials that were prepared or received by public servants, on government time, with government facilities, in the course of discharging their governmental duties and/or exercising the powers of the Presidency. They relate to the entire range of issues faced by our Government in recent years, including such matters as the world-wide energy crisis, fundamental shifts in our policy towards China, wage-price controls, inflation, crises and conflicts in the Mideast and Southeast Asia, environmental standards, antitrust policy, housing, education and a multitude of other important matters.

The record below establishes that the presidential materials consist of approximately 42 million documents and 888 5-inch reels of tape-recorded conversations. Of the 42 million documents, appellant admits that he actually saw no more than 200,000.[3]

Many of the materials covered by the Act are of critical importance to the ongoing affairs of the Government. The record below amply establishes the obvious fact that government is a continuing process that does not begin afresh whenever a President departs from office. Various records from appellant's Presidency are currently needed, and will in the future be needed, by the

[3]The Jurisdictional Statement seeks to convey the impression that the dispute in this litigation relates only to this relatively small percentage of the materials, which, it is claimed, are readily identifiable and segregated from the other 41.8 million documents. In fact, however, appellant's pleadings, briefs and arguments in the court below consistently claimed that he is entitled to sole custody of all 42 million records. Moreover, appellant filed a personal affidavit and numerous briefs in the district court in which he asserted that privileged documents and personal, private communications are intermingled throughout the corpus of the presidential materials that are covered by the Presidential Materials Act.

Ford Administration, by Congress, by parties in litigation before the courts, and by the public in general.[4]

For example, the Justice Department has disclosed that "the National Security Council has a group of files which they are constantly using, which are part of the White House papers, so called." The record establishes that the following NSC materials, among others, are among the documents that appellant seeks to acquire in this litigation.

> —Memoranda of conversations between the President and foreign Heads of Government/State and other foreign dignitaries.
>
> —Defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure.
>
> —Telegrams originating in the White House dispatched to foreign governments, U.S. ambassadors, and force commanders relating to foreign policy and national security decisions.
>
> —Sensitive incoming cable traffic associated with negotiations, plans, evaluations, and the impact of decisions taken on national security.[5]

In addition to the needs of the executive branch, many of the presidential materials that appellant seeks relate to

[4]*See generally* the opinion of the court below, Appendix to Jurisdictional Statement at 52a-61a, 408 F. Supp. at 349-54. For brevity, the parallel citations herein will be cited as "App.__, F.S.__." The Jurisdictional Statement will be cited as "J.S. __."

[5]Among other instances of current government need, the record below establishes that General Scowcroft entered the vault containing Nixon administration materials on April 4, 1975 in order to secure the Nixon-Thieu correspondence. This entry coincided with questioning from Congress and elsewhere as to whether appellant as President had made secret commitments to use American force to enforce the 1973 Paris accords on Vietnam.

matters of current congressional concern. For example, in recent months the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities obtained access to and utilized documents from the Nixon administration in its comprehensive review of the nation's intelligence programs.[6] The record below catalogues numerous additional congressional requests that have been opposed by appellant subsequent to his departure from public office.

In a nation where government operates under the rule of law, records of the executive branch are also inevitably needed in a wide variety of judicial proceedings. The record establishes that subpoenas for Nixon administration materials have been served in a number of cases and that appellant has regularly resisted production. The judicial proceedings have, of course, included the investigation and prosecution of the Watergate matters, and in November 1974, the Ford administration entered into an agreement with the Special Prosecutor, prescribing procedures for direct access by members of the Prosecutor's

[6]When the Senate committee sought access to these materials, the Ford administration indicated that it intended to make them available. Appellant fought both the committee and the White House until it became clear that litigation would ensue in which the incumbent President would not support the former President's resistance.

In contrast to the relative success of the Senate Intelligence Committee, the President's Commission on CIA activities within the United States was completely unable to gain access to presidential materials relevant to its mandate. Because of the Rockefeller Commission's short life, it could not undertake litigation to challenge Mr. Nixon's opposition to access by others to the records of his Administration. See *Report to the President by the Commission on CIA Activities within the United States*, 172 n.1 (1975).

staff to certain of the presidential materials. This arrangement was premised on the "personal determination" by President Gerald R. Ford that "the due administration of justice and the public interest require that the Special Prosecutor have prompt and effective use of" the presidential materials.[7]

Finally, the records of appellant's Administration are essential to an understanding by the nation at large of matters of deep public concern. When appellant resigned from the Presidency, mooting the pending impeachment proceedings, the nation's opportunity for a full exposure of the offenses alleged by the House Judiciary Committee was temporarily aborted. The pardon of Mr. Nixon in September 1974 for all crimes committed while in office made it unlikely that there would be a full airing of the facts in judicial proceedings, and the Nixon-Sampson agreement raised the spectre that the record would be permanently suppressed or destroyed. Congress' judgment was that this situation posed a threat to the nation's political health and that the Act was necessary to correct any flaws in our institutions and, not least, to restore public confidence in our Government.

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[7]For another example of the many situations in which the just disposition of judicial proceedings requires access to the presidential materials, *see Sun Oil Co. v. United States*, 514 F.2d 1020 (Ct. Cl. 1975).

In *United States v. National Broadcasting Co.*, 1974-2 Trade Cas. ¶75,396 (D.C. Cal. 1974), which was instituted by the Nixon administration, the Government alleged Sherman Act violations by the major television networks. After Mr. Nixon left office, the action was dismissed because of the Justice Department's inability to comply with a discovery order regarding documents included in the presidential materials of the Nixon administration. After the dismissal, the district court permitted the Ford administration to reinstitute the action on independent grounds.

B. BACKGROUND OF THE ACT

The Presidential Materials Act is not the first, but only the most recent, legislation dealing with preservation of the papers of the executive branch of the Government. The Federal Records Act of 1950, 44 U.S.C. §§2701-3107, and the Presidential Libraries Acts of 1950 and 1955, 44 U.S.C. §2101 *et seq.*, established procedures to preserve government records and to receive additional private materials pertaining to the President and other federal officials. More recently, the Freedom of Information Act, 5 U.S.C. §552, was enacted in an effort to insure that the recorded actions of Executive agencies would be open to public scrutiny.[8]

In 1973, the Watergate hearings and the controversy over personal income tax deductions for "donations" of governmental materials focused public attention on the records of public officials, and it became clear that existing laws were not resulting in effective government retention and control. In late 1973 and early 1974 a number of bills were introduced in an effort to remedy this problem.[9]

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[8]The record below does not support Mr. Nixon's assertion (*see* J.S. at 12) that an "unvarying tradition" establishes his right to dispose of the presidential materials "as he pleases." *See, e.g.*, App. 53a n.40, 70a n.53, F.S. 350 n.40, 358 n.53. See also p. 23 n. 18, *infra*, and the Joint Memorandum of Intervenor-Defendants in the court below, at pp. 51-54 and App. I. Moreover, even if such a "tradition" existed, Congress and President Ford were clearly not required to tolerate an unwise practice in perpetuity, especially in light of dramatic changes in the size and role of the executive branch in the conduct of the U.S. Government.

[9]*See, e.g.*, H.R. 12116, 93d Cong., providing that all papers "produced or acquired" by any federal officer or employee in conjunction with his official duties shall be U.S. property; S. 2951, 93d Cong., providing that all materials relating to public business shall, with minor exceptions, be treated as public documents and deposited in the Archives.

On August 9, 1974, appellant resigned from the Presidency. Within hours, White House archivists were summoned to an emergency meeting and, working virtually around the clock, they began to collect and box, for immediate shipment to California, the documents and papers of appellant's administration. The archivists were "under great pressure to get the materials collected as rapidly as possible."

Shipment of the materials to California was temporarily delayed when the Special Prosecutor asserted that some of the documents and tapes might be needed in connection with his investigations of the various Watergate matters. However, on September 8, 1974, contemporaneously with the announcement of the pardon of the former President, the White House disclosed the terms of an agreement that had been entered into between appellant and the Administrator of General Services, Arthur Sampson. In pertinent part, the Nixon-Sampson agreement provided that:

- —All materials compiled during appellant's administration were to be transferred immediately to California, to be transported and maintained there at taxpayer expense;
- —Mr. Nixon was to "retain" all legal and equitable title to the materials;
- —Ultimate control over access to all materials would rest in the hands of Mr. Nixon alone;
- —After three years, Mr. Nixon could withdraw all the materials (except the tapes) for "any purpose" (including destruction);
- —After five years, Mr. Nixon could order the destruction of whatever tapes he wished, and, in any event, all the tapes would be destroyed by

September 1, 1984, or upon appellant's death, whichever event should first occur.[10]

Announcement of this agreement caused an immediate flood of protest and concern from the Special Prosecutor, from Congress and from the public. Several lawsuits were filed; legislation was introduced; and on December 9, 1974, the Presidential Recordings and Materials Preservation Act was approved by a near-unanimous vote of both the Senate and the House of Representatives. The Act was signed into law by President Ford on December 19. Appellant filed this lawsuit the next day.

C. PROVISIONS OF THE ACT

The Presidential Materials Act provides for the General Services Administration ("GSA") to collect the documents and tapes of the Nixon Administration (§101) and prohibits their destruction (§102(a)). The Act gives Mr. Nixon and his designees full access to the materials at all times (§102(c)) and provides for like access by the Special Prosecutor (§102(b)) and by government agencies "for lawful Government use" (§102(d)). It further provides that GSA shall promulgate regulations respecting general public access that will make certain materials available to the public (§104).

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[10]The agreement had been drafted in great haste. On September 3, 1974, appellant's attorney was advised of the impending pardon and was told that the White House wished to be relieved of responsibility for the tapes and papers. On September 5, Mr. Nixon's attorney presented a draft of an agreement that would, with minor changes, become the Nixon-Sampson agreement. Mr. Sampson was summoned to a meeting on the evening of September 7; he read the agreement then for the first time; and he signed it, without modification, twenty minutes later. The pardon was announced the next morning.

The public access regulations are required to take into account the need to inform the public of the truth about "the abuses of governmental power . . . identified [as] Watergate" (§104(a)(1)); the need to make the materials available for use in judicial proceedings (§104(a)(2)); the need to prevent general access to national security information (§104(a)(3)); the need to protect every individual's right to a fair trial (§104(a)(4)); the need to protect the right of any party to "assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials (§104(a)(5)); the need to provide public access to materials of general historical significance (§104 (a)(6)); and the need to provide plaintiff or his heirs "for his sole custody and use" those materials which are not likely to be related to "Watergate" and are not otherwise of general historical significance (§104(a)(7)).

Section 105(c) of the Act provides that if a court determines that the statute has deprived any person of private property without just compensation, the person shall be paid such amount as may be adjudged just by the court.

After making immediate provision for the preservation of the Nixon administration materials, Title II of the Act establishes a commission to study and report to Congress on the manner in which the records of federal officials, including future administrations, should be controlled and preserved, with a view toward future legislation. 44 U.S.C. §§3316-17.

Contrary to the characterization of the statute in the Jurisdictional Statement, *the Presidential Materials Act does not retain Mr. Nixon's private papers.* The statute makes it clear that the Act seeks to regulate only those materials that were prepared or received by public

servants in the course of discharging their governmental responsibilities. The Act applies only to "Presidential historical materials"—*i.e.*, those pertaining to the Presidency. Moreover, the statute expressly provides that all materials that are neither related to the Watergate matters nor otherwise of general historical significance will be given to appellant "for his sole custody and use" (§104(a)(7)), and it recognizes the right of any person "to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials (§104(a)(5)). *See also* §104(c).

The legislative history and the proposed regulations leave no doubt but that private and personal papers will not be retained by the Government.[11] The regulations define the "private or personal materials" that will be given to appellant as all:

> "papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities, including private political association, and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff."

Indeed, all of the appellees, including the Government, have stated repeatedly in this litigation that the statute does not cover Mr. Nixon's private, nonpresidential papers. Appellant is attempting to extend the reach of the Act in a manner contrary to his interests simply

[11] *See, e.g.*, H. R. Rep. No. 93-1507, 93d Cong., 2d Sess. (1974) at 5, 7; 120 Cong. Rec. S. 18236 (daily ed. Oct. 3, 1974) (remarks of Senator Nelson); 120 Cong. Rec. H. 11209 (daily ed. Dec. 3, 1974) (remarks of Representative Brademas); GSA Proposed Regulations §§105-63.104(a), (b), 105-63.401-5 (April 13, 1976).

because he believes that such an extension would create constitutional impediments to the statute as a whole.

D. THE DECISION OF THE THREE-JUDGE COURT

In this three-judge court action, appellant challenged the constitutionality of the Act on its face, not as applied. The court below (Judges McGowan, Tamm and Aubrey Robinson) limited its decision to the issues that are ripe for adjudication prior to the promulgation of regulations governing public availability. App. 18a-31a, F.S. 334-40. Since the public's rights of access will depend on GSA regulations that are not yet in effect, the court postponed for later consideration Mr. Nixon's claim that public disclosure would impinge on various of his constitutional rights.

The court unanimously held that preservation by the Government of the presidential materials of former Executives does not impinge on the powers or privileges of the Presidency. App. 31a-66a, F.S. 340-57. Rejecting appellant's abstract separation-of-powers argument, the court ruled that appellant's claim must be resolved by a pragmatic consideration of the extent to which the act of one branch of the Government prevents another from performing its assigned duties. App. 34a-35a, F.S. 342. Since President Ford signed the Presidential Materials Act into law and his administration has actively defended it against appellant's private challenge, the court found "much to commend" the position that the theoretical impairment of executive powers perceived by appellant (but not recognized by the current President) "could not be the basis for invalidating the act." App. 37a, F.S. 343. However, the court found it unnecessary to dispose of the case on that ground for "even assuming *arguendo* that Mr. Nixon may, as a former President, assert executive

privilege, such a claim is not as forceful as one raised by an incumbent." App. 40a, F.S. 344.

The district court noted that appellant while in office could have seen no more than a fraction of one percent of the millions of documents which he claims in this litigation. App. 40a, F.S. 345. Moreover, the court recognized that even with respect to the small percentage that might arguably be privileged, a number of considerations erode the confidentiality of presidential materials after a former President has left office. App. 42a, F.S. 346. First, the record disclosed that former Presidents and their advisers usually publish memoirs and that appellant himself had established a tape recording system to aid him in doing so. App. 42a-43a, F.S. 346. Second, every former President in recent years has deposited the materials of his administration in a presidential library for preservation and eventual disclosure, an example that appellant claimed he intended to follow. App. 43a-45a, F.S. 346-47. Third, even assuming that some of the presidential materials should be withheld from disclosure, past Presidents have uniformly adopted the practice that would be employed under the Act of employing government archivists—"whose record for discretion in handling confidential material is unblemished"—for the purpose of reviewing and classifying presidential papers. App. 45a, F.S. 347.[12]

Furthermore, the court below held that important public interests outweighed any interest that appellant might have in controlling all of the records of his

[12]The record below demonstrates that appellant himself would have used these archivists even if the Presidential Materials Act had not been enacted. The district court recognized that that review of the millions of presidential materials "requires both enormous expertise and enormous manpower." App. 46a, F.S. 347.

administration. App. 48a-66a, F.S. 348-57. The court concluded that preservation for history, so that the nation can understand its past, "could hardly be more integral to a society based on democratic principles and devoted to freedom of expression. . . ." App. 51a-52a, F.S. 350. Moreover, "[g]overnmental programs and policies do not expire every four or eight years" (App. 52a-53a, F.S. 350); and the court took note of the extensive record evidence of the ongoing needs of the executive, legislative and judicial branches for access to materials of the Nixon administration. App. 52a-61a, F.S. 350-54. The court further observed that Congress had an adequate basis for concluding that former Presidents, including especially appellant, might not screen the records in a disinterested manner, and that government archivists would better protect the public interests in the materials. App. 46a-48a, F.S. 347-48.

The district court also rejected the claim that review of presidential materials by government archivists would violate any of appellant's constitutionally protected rights of privacy or free speech and association. App. 67a-93a, F.S. 357-69. The court found that appellant saw no more than 200,000 of the 42 million documents and that not more than a tiny fraction of these relate to personal and private matters, as distinguished from government affairs. App. 69a, F.S. 358. Given the fact that private and governmental materials were intermingled by appellant's administration in a manner that makes it "impossible to segregate [them] other than by reviewing all of them" (App. 79a, F.S. 362), the court determined that screening by professional, discreet archivists is not only "a reasonable response to the difficult problem caused by the mingling of personal and private documents and conversations in the midst of a vastly

greater number of nonprivate documents," but is also "the least intrusive manner" of protecting government interests of overriding importance. App. 87a-88a, F.S. 367. With respect to appellant's claim that the Act would impinge on his First Amendment right of associational privacy, the district court pointed out that the statute guarantees the return to appellant of all such private materials after they have been screened, on a confidential basis, by archivists. App. 89a-93a, F.S. 367-69.[13]

Finally, the district court rejected appellant's argument that the Presidential Materials Act denies him equal protection of the laws and constitutes a bill of attainder. The court noted, *inter alia,* that appellant is the only former President whose papers have not been deposited in a presidential library (App. 93a-94a, F.S. 370); that Title II of the Act establishes a commission to study and propose legislation concerning the papers of all federal officials (App. 94a, F.S. 370); that Congress had an adequate basis for concluding that the Government, rather than appellant, was the better custodian for the materials (App. 95a-96a, F.S. 370-71); and that appellant's characterization of the statute as punitive "falls far short of making out a meritorious bill of attainder claim." App. 98a, F.S. 372.

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[13]Appellant's claim that virtually everything he did while in office was "political," and therefore protected by the First Amendment, was rejected by the court. See pp. 23-25, *infra.*

ARGUMENT

A.

THE QUESTIONS RAISED BY APPELLANT CONCERNING THE CORRECTNESS OF THE LOWER COURT'S DECISION ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The unanimous opinion of the lower court, consuming over 100 pages, analyzes the facts and law with extreme care and thoroughness. It carefully points out, in a 12-page preliminary discussion, that the legal question presented is a narrow one. Only by resorting to broad abstractions, well removed from the concrete facts of this case, can appellant's Jurisdictional Statement assert that this case involves "issues of constitutional principle . . . fundamental to our system of government." The Jurisdictional Statement merely repeats a miscellany of arguments that were presented to, and decisively laid to rest by, the lower court. We briefly discuss them here to show that, however historic may be the *facts* that gave rise to this case, the *legal* questions in this appeal are unsubstantial.

1. The Act Does Not Violate the "Separation of Powers" Doctrine or Intrude on "Presidential Privilege."

The short answer to appellant's contention that the Act trenches on executive prerogative is that the executive branch itself has defended the Act in this case. There is simply no dispute between the legislative and executive branches concerning the constitutionality of the statute. The incumbent President signed the Presidential Materials Act into law; the incumbent President has operated under the Act for seventeen months without expressing any concern that it is hampering the free flow of candid

advice; and the incumbent President authorized the Department of Justice to defend the Act before this Court.

Under the rule of *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953), the fact that the executive branch has not only refused to endorse appellant's "separation of powers" and "executive privilege" claims, but is actively opposing them as well, precludes him from advancing such contentions as a private citizen.[14] To hold otherwise would be to allow a former President, who is no longer publicly accountable, to frustrate his successor by withholding documents essential to the continuity of government. In any event, assuming *arguendo*, as the district court did, that Mr. Nixon has some remaining right to assert presidential privilege (*see* App. 40a, F.S. 344-45), the fact that the incumbent President opposes such claims must be viewed as compelling evidence of the invalidity of Mr. Nixon's contention that the Act is undermining the Presidency.[15]

Moreover, the record, findings and conclusion of the district court establish that far from impairing the ability of the President to discharge his duties effectively, the Act will enhance the Presidency by promoting a more orderly transition between those who hold that impor-

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[14]The assertion in the Jurisdictional Statement that the court below "repudiated" the holdings of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *O'Donoghue v. United States*, 289 U.S. 516 (1933), is plainly incorrect. The court simply held that the language lifted by appellant from those cases was not controlling where a *former* President is asserting claims which both the incumbent Executive and Congress oppose.

[15]The district court explicitly recognized that the *incumbent* President could assert presidential privilege in appropriate circumstances. App. 37a n.26, F.S. 343 n.26.

tant office (App. 52a-57a, F.S. 350-52); that presidential materials from former administrations have ongoing importance for the functioning of the legislative and judicial, as well as the executive, branches of government (App. 59a-61a, F.S. 353-54); and that preservation for history and the healthy functioning of the political process is a valid, and fundamental, legislative goal (App. 49a-52a, F.S. 349-50).

Appellant challenges the legitimacy of these objectives by speculating that "[t]he practical effect" of the Act is to "make uncertain the confidential status of communications of current employees of the Executive and Judicial Branches." (J.S. at 19.) This overlooks several facts. First, appellant's argument relates to the issue of public disclosure, which was deferred by the court below. Second, the Ford administration, whose communications would be "chilled" if appellant's speculation were correct, has supported and defended the Presidential Materials Act.[16] Third, the circumstances surrounding appel-

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[16]It is neither necessary nor appropriate for this Court to decide the constitutionality of the hypothetical "Judicial Materials Preservation Act" that appellant postulates in his Jurisdictional Statement. For present purposes it is sufficient to note that such legislation would pose substantially different considerations than those involved here. There is no parallel between the 42 million documents generated by the hundreds of members of the institutionalized Presidency and the far smaller number of documents generated by this Court and its staff. Moreover, this Court has an entirely different function than the President in our constitutional system. The Court is intended to be insulated from public and political pressures and is confined in its power to rendering public decisions upon public records in particular cases. The legitimacy of the Court's action derives from the reasoning of its published opinions. The President, on the other hand, is an elected representative and is responsible for the general administration of thousands of statutes and programs through a vast bureaucracy. He

[Footnote continued]

lant's abrupt departure from office amid impending impeachment proceedings, together with the Nixon-Sampson agreement which explicitly required the destruction of some of the presidential materials, called for unique and urgent congressional action if public confidence in government was to be restored. Fourth, to the extent that public availability of the presidential materials is properly at issue at the present time, the question should be decided on the basis of facts in the record, and not by appellant's self-serving conjecture. The record below firmly establishes, and the district court found, that a staff member's expectation of confidentiality rapidly erodes after a President leaves office. See p. 14, *supra*.

This Court has previously rejected blanket claims of executive privilege when Mr. Nixon asserted them as an incumbent President. *United States v. Nixon*, 418 U.S. 683 (1974). Surely such overreaching claims warrant even less consideration in this case where the official representatives of the incumbent President oppose them as invalid, where appellant concedes that he never created nor saw more than a small fraction of the 42 million documents that he claims in this litigation, where appellant advances his claims as a private citizen, and where the materials relate to the administration of an official who resigned his office in mid-term on the eve of formal impeachment resolutions for alleged wrongdoing while in office.

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formulates policies and makes decisions with profound consequences without rendering a formal public judgment. His legitimacy derives from the regularity and fidelity with which he executes the laws—as evidenced in the records generated by his conduct of the office. He is accountable to the public and could go far to frustrate such accountability if he could control and destroy at will the records of his office.

Again, assuming *arguendo* that Mr. Nixon has some vestigial right to assert claims of privilege, it is clear that the district court applied the proper legal standard. Any intrusion on executive privilege resulting from the classification of the materials by professional archivists working under strict standards of confidentiality (just as other professional archivists have classified the papers of all other recent Presidents) is far outweighed by the important government and public interests in the preservation of the materials. Mr. Nixon's present contentions and speculation to the contrary do not warrant further plenary review.

2. The Act Does Not Violate Mr. Nixon's Right of Privacy.

Appellant's privacy argument rests on decisions of this Court involving intimately private acts such as procreation. But as the Court has recently held, these cases cannot be taken as standing for a broad right of privacy extending to other, far more public contexts. *Paul v. Davis*, 96 S. Ct. 1155, 1167 (1976). The Court has never suggested that the Fourth or Ninth Amendments to the Constitution permit a public official to shroud his conduct in public office from public scrutiny.[17] Rather, the Court has held on a number of occasions that the actions of a public servant should generally be open to

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[17]Appellant's effort to characterize *United States v. Nixon* as establishing such a right (see J.S. at 23) is clearly mistaken. That case dealt solely with the issues of executive privilege and separation of powers, and the Court did not hold or imply that a public official has a *personal* right of confidentiality over and above such protection as might flow from the doctrine of executive privilege and separation of powers. Moreover, in *Nixon*, the Court was considering a claim by an *incumbent* President based upon the confidentiality surrounding the active conduct of his office.

the public, which is "the final judge of the proper conduct of public business." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). *See also, New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The district court did not overlook the fact that some of appellant's truly personal papers may be intermingled among the presidential materials. However, the court recognized that the preservation and publication provisions of the Presidential Materials Act do *not* apply to such documents and that the Act mandates their return to Mr. Nixon as soon as they have been segregated from the vast majority of the records which relate to Mr. Nixon's actions as President. The district court properly focused on whether the mere act of segregating these personal papers from the government documents will violate Mr. Nixon's right of privacy. App. 79a-80a, F.S. 362-63.

The record establishes that the segregation process will be conducted by professional archivists with an unblemished record for discretion (App. 45a and 83a, F.S. 347 and 365), pursuant to a statute and regulations which fully protect the privacy rights of Mr. Nixon and all other individuals. Moreover, the Act and proposed regulations provide for judicial review of any archival decision to retain or publicize any of the materials. These procedures provide ample protection for any legitimate privacy interests that appellant might have.

The issue is a simple one: Given the fact that more than 99.9 percent of the materials relate to governmental matters, does the Constitution prohibit the Government from reviewing the records on a confidential basis for the purpose of segregating the tiny fraction of personal documents for return to Mr. Nixon? Or, conversely, does the fact that appellant mingled his personal records in the

governmental files bootstrap him into a position where he can claim a constitutionally protected personal right of privacy in—and control over—millions of records relating to the Presidency? The district court's resolution of this issue was plainly correct, and there is no need for further briefing and argument before this Court.

3. The Act Does Not Violate Mr. Nixon's Rights of Free Speech and Association.

Appellant contends that most of what he did while in office was "political" in nature and, therefore, that the documentary record of his Presidency is protected from government retention under the rationale of decisions that recognize the right of private citizens to engage in private political activity. This position is patently untenable.

The term "political" has a variety of meanings. It is one thing to hold that the Constitution permits a private individual to express his personal political preferences—*e.g.*, to join the NAACP—free from prying by the Government (*see NAACP v. Alabama*, 357 U.S. 449 (1958)); it would be totally different to conclude, as appellant suggests, that the First Amendment permits elected officials to exercise—and abuse—the powers and duties of their positions in secret because these duties entail use of "political" leadership.

According to appellant's theory, a document is "political," and hence his personal property, if it is related to "public leadership" or "the marshalling of public and political support for the President's policies . . . ." (J.S. at 26.)[18] Thus, a memorandum from a staff assistant to a

[18]Appellant's expansive definition of the term "political" is taken from the congressional testimony of Professor Herman Kahn.

[Footnote continued]

member of the National Security Council concerning the deployment of strategic weapons would be protected by Mr. Nixon's First Amendment rights if it contained any suggestion that the President's decision on the issue should include a consideration of possible "political" reaction by the American people or possible need for "political" leadership by the President to secure public or congressional support for the move.

Appellant's effort to invoke the confidentiality of private political association also leads him to claim First Amendment protection for documents that are "political" only because they reveal an abuse of government power for political purposes. For example, Mr. Nixon asserted in his deposition in this action that a memorandum from John Dean (counsel to the President) to Egil Krogh (Deputy Assistant for Domestic Affairs) suggesting action to restrict government contracts awarded to the Brookings Institution was a "political" document rather than a governmental one.[19]

Appellant's Jurisdictional Statement neglects to point out, however, that Professor Kahn also stated, in the same testimony, that:

> "Since President Roosevelt's time, it has become part of our unwritten Constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately upon departing the White House, have made their papers the property of the Federal Government." *Statement Before the Printing Subcommittee of the House Committee on Administration on H.R. 16902* at 6 (October 4, 1974).

[19]Appellant's present position is in sharp contrast to the posture he adopted in *United States v. Nixon, supra*, in which he characterized the great bulk of his activities while in office as governmental, as opposed to political, in nature. In response to a question by Justice White during oral argument before this Court, counsel for Mr. Nixon distinguished between political conversa-

[Footnote continued]

Extending personal First Amendment protection to the records generated by Presidents in the conduct of their public office would effectively shelter them from public accountability for the use—or misuse—of their publicly conferred powers. Mr. Nixon's totally unprecedented theory would treat a President's public office as a mere attribute of his private personality, from which he is entitled to exclude the public as he might if it probed into his family life, his religious views, or his strictly personal political affiliations unrelated to the use of public authority. Like other positions Mr. Nixon has taken, this theory assumes that the President is somehow the source of sovereign powers, rather than merely the servant of a sovereign people. This expansive concept of the "political" activities protected by the First Amendment would also entitle other officials and employees of the executive branch to claim that the public is prohibited from prying into the "political" manner in which they discharge their duties. The constitutionality of the Federal Records Act and the Freedom of Information Act would be doubtful at best.

The district court did not overlook the possibility that some strictly private associational materials might have been intermingled by appellant among the presidential materials of his administration. However, as in the case of the other private materials that appellant seeks, the court

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tions and those relating to performance of his duties as President. (Tr. at 84-86.) The following question and answer followed:

> "QUESTION: Would you automatically say that every conversation about Watergate is in the course of the performance of the duties of the President of the United States?
>
> "MR. ST. CLAIR: I would think it would be, yes, sir." (Tr. at 86.)

properly concluded that such records will *not* be retained under the Act and that "any burden arising solely from review by professional and discreet archivists is not significant, and certainly not significant enough to outweigh countervailing government interests." App. 92a, F.S. 369. Such a confidential review is certainly no more intrusive on appellant's associational rights than examination by government officials of the mandatory reports on political contributions established by the Federal Election Campaign Act. *See Buckley v. Valeo*, 96 S. Ct. 612 (1976).

4. The Act Does Not Constitute a Denial of Equal Protection or a Bill of Attainder.

Appellant's contention that the preservation and classification of the materials at issue constitutes a denial of equal protection and a bill of pains and penalties deserves little attention by this Court. The district court properly applied the well-established rule that a legislative enactment does not violate the equal protection clause merely because it "address[es] itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). *Accord: Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 39 (1973). The court was equally correct in concluding that only the "clearest proof" of punitive legislative intent can justify characterizing a statute as a bill of attainder (*Flemming v. Nestor*, 363 U.S. 602, 617 (1960)), and that, contrary to Mr. Nixon's bald allegations, both the Act and its legislative history clearly demonstrate that Congress' intent was remedial in nature. App. 93a-103a, F.S. 369-74.

B.

FURTHER PLENARY REVIEW WOULD SUBSTANTIALLY DELAY THE IMPLEMENTATION OF THE IMPORTANT OBJECTIVES OF THE ACT.

There is a further reason why this Court should immediately affirm the judgment of the court below. Congress' judgment in enacting the Presidential Materials Act was that there was a need "to provide the public with the full truth, *at the earliest reasonable date*, of the abuses of governmental power [known as] 'Watergate' " (§104(a)(1), emphasis added). The statute directs the General Services Administration to act expeditiously in processing the presidential materials. Moreover, Congress expressed concern about possible litigation delays, and it directed the district court to treat Mr. Nixon's challenge as a matter requiring "immediate consideration and resolution" and to give it priority over other cases (§105(a)).

As of the date of this Motion, 21 months have passed since appellant resigned from office, and the Act has been in effect for 17 months. Processing of the presidential materials cannot even begin until this appeal has been affirmed. Especially in light of the unsubstantial nature of appellant's claims, further delay is neither necessary nor appropriate.

CONCLUSION

For the reasons discussed above, we respectfully submit that the judgment and decree of the district court should be affirmed.

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Supreme Court, U. S.
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JUN 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1605

RICHARD NIXON,

Appellant,

—v.—

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS *et al.*, JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1605

RICHARD NIXON, Appellant

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS, ET AL., JACK ANDERSON,
LILLIAN HELLMAN, ET AL.,
Intervenor-Appellees.

On Appeal from the United States District
Court for the District of Columbia

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees Lillian Hellman, et al., 1/ hereby move to dismiss

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1/ Lillian Hellman is an author and playwright who serves as co-chairman of the Committee for Public Justice, a public interest group concerned about issues of civil rights and civil liberties. Shortly after an agreement was signed on September 8, 1974 between appellant Nixon and the then

(cont. next page)

the appeal herein, or in the alternative, to affirm the judgment and order of the district court. The grounds for this motion are (1) that the questions upon which the decision of the case depends are so insubstantial as not to need further argument; or (2) that the district court adequately and correctly determined the issues herein and that further delay would defeat the important objectives of the

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Administrator of General Services, Arthur Sampson, purporting to grant Mr. Nixon ownership and possession of 42 million White House documents and tape recordings, Miss Hellman and other members of the organization (consisting of editors, writers, historians, and lawyers) instituted a Freedom of Information Act suit in the district court, Hellman v. Sampson, C.A. No. 74-1551, to gain access to the materials at issue. (This was one of three related FOIA cases referred to in this litigation as the "consolidated cases.") When the appellant, Mr. Nixon, commenced this action, Miss Hellman et al. moved to intervene as defendants, since the Justice Department, which was representing GSA, had opposed their FOIA claims and had taken a narrow and antagonistic position concerning the scope of government control of Presidential materials. In addition, Mr. Nixon's suit was closely related to the consolidated cases in which proceedings had been virtually completed. The district court granted the motion for intervention.

legislation which is challenged in this case.

ARGUMENT

POINT I

NO SUBSTANTIAL QUESTION IS PRESENTED SINCE APPELLANT NIXON HAS SUFFERED NO INJURY, AND MAY NEVER BE INJURED, BY THE LEGISLATION IN QUESTION

Appellant Nixon is attacking the provisions of the Presidential Recordings and Materials Preservation Act, P.L. 93-256, 88 Stat. 1695; 44 U.S.C. §2107, note, 3315-24 (December 19, 1974). The Act, signed into law by President Ford on December 19, 1974, superseded the Nixon-Sampson agreement referred to above and directed the General Services Administration ("GSA") to obtain possession of all tape recordings of conversations occurring in the White House or other offices used by Mr. Nixon and all "presidential historical materials." Section 101(a) and (b). The Administrator was directed by the statute to issue regulations covering public access to the materials, taking into account various factors. These included the need to provide the public with the full truth of governmental abuses associated with "Watergate"; the need to protect any party's opportunity to assert a legally or constitutionally

based right or privilege which would limit access to materials which have general historical significance; and the need to allow Mr. Nixon and his family to retain all other materials not related to Watergate and not of general historical significance. Section 104(a).

Under the Act, GSA was required to submit its proposed regulations to Congress within ninety legislative days. Either House then had the power to disapprove. Section 104(b). The Senate exercised this disapproval power on September 11, 1975 (121 Cong. Rec. §15803-08, daily ed. September 11, 1975). A revised set of regulations was later submitted to Congress. GSA sought to withdraw these following the district court decision in this case. 2/ As of this moment, no regulations have yet taken effect.

It is entirely possible that GSA and Congress, guided by the district court decision below, will take into account some if not all of Mr. Nixon's complaints and will issue final regulations which protect all of the rights that he claims are being infringed. As the district court noted:

> Objections he now presses

2/ See S. Rep. No. 94-748, 94th Cong. 1st Sess. (1976); S. Rep. 428, 94th Cong. 1st. Sess. (April 8, 1976).

> might be mooted by regulations that might protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass under the regulations finally placed in effect. 408 F. Supp. at 336.

Even if the regulations do not meet all of Mr. Nixon's objections, Section 105(a) provides for swift judicial review of the final regulations. Any alleged constitutional infirmity in these regulations can presumably be corrected. And review by this Court would be more appropriate when the regulations crystallize potential problems in final form so that any possible injury to Mr. Nixon can be clearly revealed. Thus, it is difficult to see how the Act on its face can be said to violate any of Mr. Nixon's rights. His claim that the statute is facially invalid is clearly insubstantial.

POINT II

NO CONSTITUTIONAL RIGHT OF MR. NIXON IS VIOLATED BY THE STATUTE

Mr. Nixon relies upon five separate constitutional grounds as a basis for his claim that the Act is facially unconstitutional. He alleges that the Act: (1) violates the principle of separation of

powers between Congress and the Presidency; (2) abridges his Presidenital privilege recognized by this Court in United States v. Nixon, 418 U.S. 683 (1974); (3) violates his constitutionally based right to privacy; (4) infringes upon his rights of association and speech protected by the First Amendment; and (5) amounts to a violation of equal protection since no other President has been subject to the seizure of his materials.

The arguments on separation of powers, Presidential privilege and equal protection have been more than adequately dealt with by the district court below and in the Motion to Affirm filed in this action by the Reporters Committee for Freedom of the Press, et al. Appellees hereby adopt the arguments on those matters presented by the Reporters Committee and will not further burden the Court with respect to those issues.

In view of appellees' particular concern with civil liberties, however, they feel obliged to make a more detailed response to Mr. Nixon's claim that his right to privacy and his First Amendment rights are violated by the Act in question.

The Right to Privacy: Mr. Nixon cannot claim that he had any "reasonable expectation of privacy" with respect to the conduct of his office. This Court has stated that government officials must always be prepared to give "an accounting of their use or abuse of their public trust." Uniformed Sanitation

Men v. Sanitation Commissioner, 392 U.S. 280, 284 (1968). Under those circumstances, no government official no matter how high can reasonably expect that he can hide his use or abuse of governmental powers from scrutiny either during his tenure or after his term of office has expired. The grant of governmental office carries with it an obligation to account to the citizens for the conduct of the office. No precedent, no matter how long established, can support a claim that ex-Presidents may hide from public view the manner in which they served as chief executive. In short, no tape or document dealing with Mr. Nixon's conduct of his office can be protected from public access on the ground that he "reasonably expected" that he could withhold that material from the people he served.

To the extent that Mr. Nixon claims that conversations with his wife, children, lawyer or minister may be included within the materials at issue, he is protected from public disclosure in at least two separate ways: (1) the Act does not purport to seize these materials; and (2) a common-law privilege will protect intimate materials not related to the Presidency. It is true that because of the possible co-mingling of materials some examination of documents or tapes must be made by an archivist to determine in which category a particular document may fall. But such a determination by a professional archivist has been required with respect to the Presidential materials

of all the recent chief executives. See the district court discussion below at 408 F. Supp. at 365 and n. 60.

Free Speech and Association: Mr. Nixon's claim that his First Amendment rights will be violated by the Act can only be characterized as bizarre. An ex-President has no First Amendment right to hide his conduct in office from the people. Rather, the people have a First Amendment right to an accounting from him, since, as this Court has held, "the right to the public to receive suitable access to social, political . . . and other ideas and experiences . . . may not constitutionally be abridged. . . . [The goal of the First Amendment is] producing an informed public capable of conducting its own affairs." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). See also Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972).

The Act protects the First Amendment rights of Mr. Nixon as a citizen but not as chief executive. See 408 F. Supp. at 368, n. 65. In any event, there is no indication at this time before any regulations have been issued that Mr. Nixon's political or associational rights will be infringed. And the basis of Mr. Nixon's First Amendment right--namely that his inconsistent political stands will be disclosed making it more difficult for him to engage in political activity in the future --is simply too unreal and speculative to

serve as the basis for any relief.

CONCLUSION

For the reasons stated above, appellees Lillian Hellman, et al., respectfully submit that the questions are so insubstantial as not to need further argument, and the appellees respectfully move this Court to dismiss the appeal, or in the alternative to affirm, summarily.

Respectfully submitted,

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IN THE

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On Appeal from the United States District Court for the District of Columbia

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APPELLANT'S REPLY TO THE MOTIONS TO AFFIRM

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APPELLANT'S REPLY TO THE MOTIONS TO AFFIRM

Both the Government and the intervening parties [collectively "the appellees"] seek to avoid this Court's review—at least at this time—by requesting summary affirmance of the district court's decision. The intervening parties go so far as to state that the issues are "unsubstantial" and stress that review will delay implementation of the Act (*i.e.*, their speedy access to the materials of appellant's Presidency) (Reporters Comm. Motion to Affirm 2). The Government,

not as sanguine about the unsubstantiality of the issues, argues that they "... are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate," and that "[f]urther judicial consideration of the underlying issues appellant seeks to raise should appropriately await issuance of final regulations" (Govt. Motion to Affirm 11, 12). In fact, the principal issues presented by this case are fully ripe for review and summary affirmance of the decision below would only serve to foreclose meaningful appellate consideration of the serious constitutional problems posed by the Act. Moreover, affirmance would establish as law by this Court certain holdings of the lower court the Government expressly disavows, and would defeat—because of the impossible burden of effectuating his rights under any regulatory system—those rights and privileges the lower court admitted appellant has in the seized materials.

1. The intervening appellees' statements notwithstanding, there is really no question but that the issues this Act presents are substantial and unprecedented. Congress has never before attempted to legislate the conditions under which a President's confidential files and private conversations will be published to the world. Its effort to do so here, therefore, raises the fundamental question of whether the separation of powers doctrine, which has undergird each constitutional officeholder's right throughout our history to control the internal affairs of his own office, permits legislation that directs a political appointee, subject to congressional confirmation and operating under congressionally imposed standards, to decide whether and when a President's privately recorded thoughts, opin-

ions and beliefs will be made public. The question also arises whether the purposes the Act purports to serve justify government employees reviewing intensely private and politically sensitive conversations of the kind this Court has already held are *presumptively privileged* against disclosure to even a single official of the Executive Branch. *United States* v. *Nixon*, 418 U.S. 683 (1974) (demand by Special Prosecutor held to be justiciable intra-branch dispute). This Act reverses that presumption in favor of public disclosure and substitutes a general interest in historical research for the compelling showing of need for particularized information this Court said was required to justify a breach of presidential confidentiality.

The questions this Act raises cut to the very core of the relationship between Congress and the President. While it is true that "[f]or almost two centuries these issues . . . have been left to be accommodated by the ebb and flow of political forces . . ." (Govt. Motion to Affirm 11), Congress has pressed the point by enacting this legislation. The responsibility for a definitive resolution of whether Congress possesses the power to interject itself in this fashion into the internal affairs of the Presidency rests not with a district court but with this Court.

In the same vein, appellant's claims based on personal constitutional rights under the First, Fourth and Fifth Amendments raise significant issues concerning whether such fundamental guarantees can be "outweighed" by an interest in public information about Watergate or history in general, or by other interests, such as access to material for judicial or legislative proceedings, which could and always have been accom-

modated by such legally sanctioned procedures as the subpoena process.[1] Although the legal principles underlying appellant's personal constitutional claims are by no means novel, their application to the only statute ever to seize the entire product of a man's life spanning over five years is highly novel, and the district court's strained effort to fit this Act into the mold of such legislation as the Safe Streets Act of 1968 illustrates why the lower court's decision necessitates careful review by this Court.

2. Summary affirmance of the decision below would be particularly inappropriate. Significantly, the Government's own motion provides the reason. While urging this Court to affirm the district court's

[1] The principal interest appellees rely upon to justify the Act is access to the material for current government business. The only evidence submitted by the Government concerning its needs in that regard pertains exclusively to the National Security Council (NSC) staff files, which are segregated materials comprising 403 boxes of file folders. A valid interest in that material could only support specific legislation rather than a blanket seizure of all of appellant's recorded conversations and his and his staff's political files.

Contrary to the appellees' protestations that the business of government would be impeded by appellant's retention of his tapes and papers, the record to date establishes that, apart from the Special Prosecutor's investigations, there has been *not a single instance in over two years* in which the Government has needed access to appellant's recorded conversations for current business of the Executive Branch. As for the Special Prosecutor's needs, at the time the Act was passed counsel for appellant and the Special Prosecutor were in the midst of negotiations concerning consensual production of recorded conversations relevant to his investigations. Those negotiations produced an agreement under which the Special Prosecutor requested 55 conversations. Only 16 of those contained information pertinent to his inquiries. All 55 requests were in a form equivalent to a subpoena and illustrate that the Special Prosecutor's needs—or those of any other litigant or congressional committee—could have been satisfied through recognized, legal procedures without the broad scale access provision contained in the Act.

decision, thereby making it not only the law of this case but the law binding upon all courts, the Government expressly disavows *the major premise* upon which the district court's decision rests.

The district court concluded that if a former President has sufficient interest to assert the confidentiality privilege as to the materials of his own office, his claim is entitled to "much less weight." As the court put it, "It is this less forceful claim that we consider as the basis for Mr. Nixon's challenge . . ." (Juris. St. 40a). The Government, however, informs this Court that it thinks the district court was wrong. In the Government's words:

> "The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President . . ." (Govt. Motion to Affirm 18-19, n.11).

Yet, it was only by deprecating the presidential privilege when asserted by a former President that the lower court was able to hold that other interests, such as historical research, "outweighed" the interest in presidential confidentiality.

This critical inconsistency between the Government's position on presidential privilege and the law established by the district court would be sufficient in itself to warrant this Court's taking this case, for it points out just how substantial and delicate are the various constitutional issues raised by this appeal. But there are several other inconsistencies and unsupportable positions which merit this Court's attention.

For example, the Government blurs the distinction between a President and his staff and the Executive Branch in general with its hundreds of agencies and thousands of employees. It suggests that appellant's presidential materials are to be merely handled "in house" and that Congress' directives concerning review and public release of the materials, so long as administered by an executive agency, are not dissimilar, for separation of powers purposes, to statutes concerning income tax returns, census data, and records of agency actions (Govt. Motion to Affirm 14). Not only does the Government fail to see the obvious distinctions other courts have recognized, (see, *e.g.*, *Soucie* v. *David*, 448 F.2d 1067, 1080-84 (D.C. Cir. 1971) (Wilkey, J., concurring); *Nader* v. *Baroody*, 396 F. Supp. 1231 (D.D.C. 1975)), but it also chooses to downplay its own admitted belief that Section 104(b) of the Act (whereby Congress retains authority to review the public access regulations) violates the separation of powers doctrine. (Govt. Motion to Affirm 16-17, n. 10.) The Government views this attempt by Congress to participate in the public access aspects of the Act as somehow distinct from the Act's overall intrusion upon the internal affairs of a President. In other words, according to the Government, Congress can set the controlling criteria for regulations concerning publication of a former President's confidential materials without breaching the separation of powers, but cannot review the proposed regulations drafted pursuant to those criteria. The distinction is without substance. Section 104(b) is merely one aspect of Congress' overall effort through this legislation to govern the release of appellant's confidential materials. It is the purported exercise of control in any form that raises the separation of powers problem.

The Government's attempted distinction of the analogy of this Act to a Judicial Materials Preservation Act presents another troubling characterization of the Presidency. Again equating the Presidency to the Executive Branch in general, the Government describes the conduct of the Nation's affairs as "a continuing process" distinguishable from Supreme Court decisions which the Government describes as "separate events."[2] While it is true that government business at the agency level continues from one administration to the next, the business and policy decisions of the President and his immediate staff change with each administration, and *no* President has ever needed—much less had—access to the political files of his predecessor.[3] Although there is little question that the seizure

[2] This argument, like that of the intervening appellees—which relies upon such factors as public accountability—ignores the fact that the principal interest advanced by this Act is historical preservation and research. That interest clearly applies to the papers of a Justice of this Court as well as to those of members of Congress. Indeed, Title II of the Act establishes a commission to consider legislation concerning the papers of members of the Judicial and Legislative Branches. Therefore, the disposition of this case—the only case ever dealing with Congress' right to control the papers and effects of a coequal branch of government—will be the only precedent to guide that commission and Congress in the enactment of such legislation. Summary affirmance would not provide the kind of guidance warranted for this incursion into the internal affairs of constitutional officeholders.

[3] The Government contends that "[t]he business of government requires that the President and executive officials have access to the papers of his predecessors, and . . . that no claim of privilege can hinder this access." (Govt. Motion to Affirm 18). The Government's assertion is much too broad and fails to distinguish between different kinds of presidential materials. If an incumbent were to seek from his predecessor's files information affecting the national security, obviously no confidentiality privilege would bar disclosure. On the other hand, if the incumbent were to demand of a former

and disclosure of the private discussions of a President concerning political matters or personalities would prove interesting to journalists and historians, there is no basis whatever for concluding that such material is essential to the legitimate needs of government.

Given the various disagreements and reservations harbored by the Government concerning the district court's holdings on issues fundamental to the structure of our political system, it would be inadvisable for this Court to affirm summarily the decision below. Summary affirmance without careful briefing and a full appreciation of the ramifications of this unprecedented Act would place this Court's imprimatur upon each district court holding essential to its decision and would foreclose subsequent analysis of the underlying constitutional issues squarely presented at this time for review.[4]

President his memoranda discussing various political choices for potential running-mates or cabinet appointees, the former President's claim of confidentiality should undoubtedly prevail. In any event, the instances in which an incumbent has sought access to his predecessor's files in the last 200 years have been so rare that the operation of the privilege in that context is of little practical significance. It is of critical importance, however, when—as in this case—the political materials of one President are to be placed in the hands of aides of another, who will then decide under congressionally imposed criteria whether they should be published to the world.

[4] This Court could, of course, remand the case without decision to the district court for consideration of the public access regulations and thus reserve the underlying constitutional issues for later review. That course, however, would merely delay resolution of the issues now fully ripe which go to the heart of the Act's constitutionality. The lower court's consideration of public access regulations would be a useless gesture and would impact severely upon the time and resources of the parties if the Act, or any portion of it such as the tape seizure provision, is an unconstitutional breach

3. The Government argues that the fundamental issues appellant raises are not ripe for review because regulations implementing the Act were not in effect and thus were not considered by the lower court in sustaining the Act's validity. It urges that review await consideration of those regulations. A not dissimilar approach was pressed upon this Court by parties in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The statute there, like this Act, was hurriedly passed by Congress in a push for election and political reform, and several unprecedented provisions were included with little consideration of their constitutional ramifications. In addressing the "ripeness" question, this Court noted that since the time of the lower court's opinion, the Commission had issued rules and regulations and, although many of its functions remained unexercised, the date of their "all but certain exercise" was then close at hand. (*Id.* 115-17). Noting Congress' concern for "early adjudication of as many issues as possible," (a congressional concern also held with respect to this Act, see Section 105(a)) this Court proceeded to consider all aspects of the Commission's authority presented by the certified questions. (*Id.* 117.)

As in *Buckley*, implementing regulations are presently available, and the prospect of public disclosure of materials seized under the Act "is in no way hypothetical or speculative." *Regional Rail Reorganization Act Cases*, 419 U.S. 140, 143 (1974).[5] Consequently,

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of the separation of powers or presidential privilege doctrines or appellant's First, Fourth or Fifth Amendment rights.

[5] All of the public access regulations, except for one concerning possible commercial reproduction and sale of the presidential recordings, either have been approved by Congress or have been

were this Court to consider the regulations important to its analysis of the Act's validity, full review could proceed without unnecessary delay.

The fact is, however, that the regulations are irrelevant to the underlying constitutional issues posed by the Act. Regardless of how the Administrator interprets the Act's disclosure mandate, no set of regulations can affect the fundamental constitutional question of whether Congress can order the seizure of materials of a former President and impose its own standards governing their review and public release. Any set of carefully prepared regulations would undoubtedly contain the requisite cosmetic words concerning "need for presidential confidentiality" and "unwarranted invasions of privacy." However, such regulations, in order to fulfill the Act's one pervading purpose—publication of the materials for historical research, particularly as it pertains to "Watergate"—must provide that *some* of the materials will at *some* point be disclosed generally. Any legislation mandating that result contravenes this Court's decision in *United States* v. *Nixon,* 418 U.S. 683 (1974) which held that a President's confidential deliberations are *presumptively privileged* and are subject to forced disclosure only upon a compelling showing of need for specific information. The Act reverses that presumption in favor of public release and places on appellant the burden of contesting publication of the thousands of conversations and documents he considers to be confidential. That is a burden no

agreed to informally by congressional committee staffs and the Administrator. The six informally approved regulations are expected to receive congressional action within the next several weeks. The remaining dispute between the Administrator and Congress concerns the effective date of the regulations.

President or former President could shoulder: requiring appellant to raise the confidentiality privilege, or any other right or defense in a decision-by-decision regulatory procedure is the functional equivalent of depriving him of his legitimate rights and privileges in a fashion that lacks the basic fairness required by due process of law.

The ripeness of this case for review by this Court is further illustrated by the fact that if this Court were summarily to affirm the district court's decision, an estimated staff of one hundred government personnel would begin immediately reviewing the papers of appellant and his staff, including such items as appellant's political memoranda, preliminary drafts of position papers, notes from his daughters, and his personal diaries;[6] and a staff of forty stenographers, technicians, lawyers, and archivists would begin listening to appellant's private recorded conversations, including intimate discussions with his wife and family, and candid talks with his physician, his personal attorneys and innumerable friends and associates.[7] Given these

[6] Contrary to the Government's statement in its Motion to Affirm, the materials seized under the Act contain unlabeled dictabelts of appellant's private diaries which can only be identified through aural examination. Those diaries are intimately private and were never intended for use by anyone except appellant. Moreover, because appellant's personal diaries were frequently dictated in his office, which was monitored by a voice-activated recording system, the tape recordings seized under the Act duplicate a large percentage of his private diary.

[7] The appellees rely heavily on the argument that the invasion of appellant's privacy is insignificant because the review of his papers and personal conversations will be conducted by "discreet archivists" who have been trusted with the papers of other former Presidents. However, each of the six former Presidents who have established libraries for their materials, personally or through close

circumstances, appellant's claim that the Act indiscriminately seizes his tapes, diaries and files in violation of his right of privacy is unquestionably ripe.[8]

---

aides, have screened their more sensitive files before any archival processing. Nor did President Johnson or President Kennedy's family permit archivists to review their privately recorded conversations. Moreover, never before has the Archives used one hundred employees to catalogue a President's materials. But even if the number of persons reviewing appellant's private conversations and papers were not so great, it is fatuous to suggest that there will be no public exposure of confidential material. Various members of the Special Prosecutor's staff, and one former Special Prosecutor, after leaving that office have discussed or written about appellant's confidential conversations, conversations of the kind this Court instructed a trial judge to treat with utmost deference. It is naive to assume that archival employees will be any more careful not to breach the confidentiality of appellant's conversations.

[8] Appellees contend that appellant's interests pertain to no more than one percent of the material. By quantitatively minimizing appellant's rights through this supposed 99 to 1 ratio, appellees seek somehow to downplay, and thus, apparently, to justify the intrusion upon appellant's privacy and presidential confidentiality.

The fact that Mr. Nixon has an intimate interest in only a "small percentage" of the millions of pages of material is irrelevant. The recordings of appellant's personal conversations seized under Section 101(a) are clearly distinct from the documentary material and include over three years of appellant's private conversations which occurred frequently each day with his family and staff, and often with visiting government officials and friends. Thus appellant's legitimate rights and privileges pervade all of the recordings. And the lower court's failure even to consider the possibility of invalidating only the tape seizure provision of the Act (Section 104(a), which is severable under Section 105(b)), was in error. Moreover, to peg appellant's interests in his own files to some 200,000 documents he personally reviewed does not account for the volumes of follow-up memoranda of conversations, notes or other material generated by close advisors, staff and others which were routinely prepared without his review and under the assumption that they would remain confidential at his discretion, as had the materials of past Presidents.

In sum, the appellees cannot bury the substantial interest of appellant in the seized materials by pointing to an estimated 7.3 million pages of children's letters, birthday greetings, public opinion mail and GPO publications, and 11.4 million pages of files containing various types of communications among executive departments which are duplicated in the files of the corresponding agencies. The fact that the Act seizes such mountains of general material as well as a contrastingly smaller percentage of sensitive items does nothing to bolster its constitutionality.

CONCLUSION

This Act represents a drastic departure from the two-hundred-year practice that has existed because of the unique relationship among the three branches of government. The tradition of Presidents and all other constitutional officeholders controlling the materials of their offices did not arise by happenstance. It is a practice with vital underlying justifications, and Congress' decision to disregard that tradition and to infringe upon the rights and privileges it embodies deserves careful scrutiny by this Court. The fact that Congress acted precipitously in a time of passion makes this Court's review of the Act even more essential. Probable jurisdiction should be noted and the case set for argument.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees,

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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OCTOBER TERM, 1976

No. 75-1605

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v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL., *Appellees*,

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a)[1] is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the convening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F.2d 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A

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[1] "J.S. App." refers to the Appendix to the Jurisdictional Statement.

notice of appeal (App. 496)[2] was filed on March 4, 1976, and appellant's jurisdictional statement was filed May 3, 1976. This Court noted probable jurisdiction on November 29, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article II, Section 1, clause 1 of the Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America.

Article IV, Section 3, clause 2 of the Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

[2] "App." refers to the Appendix.

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title I of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. 2107 note and 3315-3324 (Supp. IV, 1974), is set out in Appendix I to this brief (pp. 1a-7a, *infra*).

QUESTIONS PRESENTED

1. Whether the fundamental principle of separation of powers mandated by Articles I, II and III of the Constitution is violated by a legislative enactment that deprives a former President of any control over the confidential papers and effects accumulated by him and his staff while in office and vests complete authority over such material in the Administrator of General Services pursuant to regulations to be approved by Congress.

2. Whether the provisions of the Presidential Recordings and Materials Preservation Act which authorize immediate access and review by the government, and ultimate access by the public generally to the confidential deliberations of a President after he has left office, without a preliminary showing of particularized

need for specific items and merely for historical purposes, violate the constitutional privilege of confidentiality and exceed the power of Congress.

3. Whether the Presidential Recordings and Materials Preservation Act violates the Bill of Attainder Clause because it constitutes a "trial by legislature" in which a specific individual has been found untrustworthy rather than setting out a rule of general applicability to be administered pursuant to a judicial proceeding.

4. Whether appellant's constitutional right to privacy, protected by various provisions of the Bill of Rights, is violated by statutory seizure of *all* the papers and effects accumulated in his home and office during a five year period, and by government screening of every item and conversation seized, including intra-family communications and recordings of personal and political conversations.

5. Whether the First Amendment rights of appellant and his advisors to free speech and association are infringed by the governmental and potential public access to his materials granted by the Presidential Recordings and Materials Preservation Act.

STATEMENT

Richard Nixon served as President of the United States from January 20, 1969, to August 9, 1974. Upon leaving office, Mr. Nixon, in keeping with the practice of every prior President, instructed his staff to arrange for the collection and transfer to him of his presidential materials. He anticipated they would be kept near his home in California until the creation of a permanent repository established under the Presidential Libraries Act, 44 U.S.C. 2101, 2107 *et seq.* (1970)

(App. 169-170). The instructions given staff members concerning the assembly of these materials were the same as those given by William J. Hopkins, a career White House employee since the administration of Herbert Hoover, for the removal of President Kennedy's materials from the White House during the first few days of the Johnson administration (App. 198-209). As in the case of other mid-term transitions, staff members were instructed in writing to retain copies of any files needed for ongoing matters. The packaging and preparation of the materials proceeded in accordance with earlier traditions until they were halted by representatives of the new administration at the behest of the Watergate Special Prosecutor. On the new administration's instructions, the materials were retained in Washington. Deposition of Philip W. Buchen, Vol. II, 70-76.[3]

In order to clarify the question of legal title to these materials, Counsel to President Ford requested an opinion from the Attorney General. A preliminary opinion, delivered by the Deputy Attorney General on August 29, 1974, and subsequently confirmed in a formal opinion by the Attorney General, advised the White House that the former President had title to these materials, but that they were subject to judicial process. 43 *Op. Att'y. Gen.* 1 (App. 220-230).

During the succeeding week, discussions were held between Mr. Nixon's counsel and legal representatives of President Ford concerning the arrangements for

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[3] The depositions of Philip W. Buchen, John Nesbitt and Arthur F. Sampson, taken in *Nixon* v. *Sampson, et al.*, 408 F.Supp. 321 (D.D.C. 1975), are incorporated in the record of this case by stipulation dated July 31, 1975.

disposition of the materials. President Ford's Counsel informed Mr. Nixon's attorneys that the Special Prosecutor had requested access to the materials and that any proposed disposition would have to accommodate the Special Prosecutor's interest. To this end, and in keeping with his long-standing intention to donate most of his presidential materials under appropriate access restrictions to the United States for inclusion in a library, the former President offered to deposit his papers with the government pursuant to the Presidential Libraries Act (App. 38-43).

To assure the Special Prosecutor that *none* of the materials would be destroyed, and at the same time guarantee that access to the materials could not occur without the former President's knowledge, Mr. Nixon's attorneys proposed a "two-key" storage system whereby neither the former President nor the General Services Administration could gain access to the papers or tapes without the consent and presence of the other (App. 39). Mr. Nixon agreed that the two-key deposit would continue for at least three years (five years for all audio recordings) during which time none of the materials could be withdrawn by Mr. Nixon and none could be destroyed (App. 40-42). The former President's agreement specifically provided that all of the materials would be subject to subpoena or other process for use in any criminal or other proceeding in which the subpoenaing party demonstrated a lawful right of access (App. 40-41). A letter incorporating these terms (hereinafter occasionally called "the depository agreement") was sent by appellant to the Administrator of General Services (the "Administrator") who signed the agreement on September 7th, after conferring with Counsel to President Ford (App. 38-43).

The terms of the depository agreement were patterned after the terms of initial deposit contained in the letters of former Presidents Johnson, Eisenhower, Truman and Hoover, each of whom, like Mr. Nixon, had retained the right ultimately to withhold certain materials from deposit or to restrict from general public access other materials because of their nature and the impact their release might have (Johnson, App. 96-102; Eisenhower, App. 83-88; Truman, App. 76-82; Hoover, App. 63-71). Mr. Nixon's proposed agreement was designed primarily to serve, as had initial deposits of the prior Presidents, as an interim step in the creation of a presidential library which would house materials of the Nixon administration.[4]

Following the Administrator's acceptance of the depository agreement, the incumbent administration refused to implement it because the Special Prosecutor insisted that he and his staff were entitled personally to review any recordings or other materials he desired and was not required, as the depository agreement contemplated, to proceed by subpoena. For several weeks attorneys for Mr. Nixon and the Special Prosecutor's Office searched for an acceptable accommodation which would permit files having no relevance to the Special Prosecutor's investigations to be transferred to Cali-

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[4] Despite the impediment posed by the challenged legislation to the creation of such a library, the former President has continued to pursue that course. In April 1975, Mr. Nixon and the University of Southern California announced that an agreement has been reached under which, in the event the challenged statute is declared invalid, the materials of Mr. Nixon's Presidency will be placed in a facility on the USC campus in Los Angeles under terms equivalent to those applicable to the materials of all other former Presidents (App. 418).

fornia under the depository agreement (Special Prosecutor's Motion to Intervene, *Nixon* v. *Sampson, et al.*, 408 F.Supp. 321 (D.D.C. 1975)). These negotiations reached an impasse in mid-October, and on October 17, Mr. Nixon filed suit against the General Services Administration, Counsel to President Ford, and the Secret Service to enforce compliance with the terms of the agreement. Mr. Nixon informed the court at the time the suit was filed that he was exempting from his requested relief the current transfer of any materials which the Special Prosecutor might designate as potentially related to his investigations (Application for Temporary Restraining Order and Plaintiff Nixon's Response to the Special Prosecutor's Motion to Intervene, *Nixon* v. *Sampson, et al., supra*).

The Special Prosecutor promptly moved to intervene in the civil suit, as did columnist Jack Anderson, who had filed a blanket Freedom of Information Act request for access to all of Mr. Nixon's presidential materials, the eleven *Hellman* plaintiffs, including playwrights, authors and lawyers, self-identified as a committee of public citizens seeking access to 147 tape recordings of presidential conversations to conduct their own Watergate investigation, and various committees and other individuals representing reporters, historians and political scientists who stated their intention to request access to the former President's materials. The Special Prosecutor's intervention request was not opposed by Mr. Nixon. The court granted various motions to consolidate and intervene, as well as the motions of Senators Ervin, Nelson, and Javits, and Representatives Hays, Brademas and Holtzman to appear as *amicus curiae* (Orders dated November 11, 1974, *Nixon* v. *Sampson, et al., supra*).

On December 9, 1974, while various motions in the district court were pending, Congress enacted the Presidential Recordings and Materials Preservation Act, which is the subject of this litigation. The Act nullified the depository agreement, authorized the seizure of all of the presidential papers and effects of Richard Nixon, and directed the GSA to arrange first for government and then for public access to those materials (App. I, 1a-7a, *infra*). The bill was signed by President Ford on December 19, and on the following day appellant filed this action, seeking declaratory and injunctive relief against enforcement of the Act on a variety of constitutional grounds. A three-judge district court was convened after actions by the court of appeals on appellant's petition for a writ of mandamus. (*Nixon* v. *Richey*, 513 F.2d 427, *motion for reconsideration granted*, 513 F.2d 430 (D.C. Cir. 1975) (J.S. App. 139a-195a)).

The three-judge court determined that it had jurisdiction under 28 U.S.C. 2282 and granted motions to intervene filed on behalf of the Watergate Special Prosecutor, the Reporters' Commitee for Freedom of the Press, et al., Lillian Hellman, et al., and Jack Anderson (the later three intervenors to proceed on a joint basis). Evidence consisting of affidavits, depositions, documentary exhibits and stipulations was submitted by the parties, and the case was briefed and argued orally. On January 7, 1976, the court, in a 104-page opinion by Circuit Judge McGowan, denied appellant's requests for relief and dismissed the complaint. The court entered an injunction barring, with certain exemptions, processing and access to the materials pending this appeal from its decision (J.S. App. 107a-108a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents constitutional questions of enduring significance to the operation of our government, but it arrives at this Court with three distinct handicaps:

First, the Act that is being tested for constitutional validity is characterized and defended in this litigation on grounds that differ greatly from those that prompted its enactment. From the briefs of the appellees both here and in the district court[5] and from the decision of the court below[6] one would suppose that the Act is a neutral law dealing forthrightly with the difficult problem described in its title—preservation of presidential materials and recordings. In fact, examination of the origin of the law, its legislative history, and the hearings that have been held on proposals for its administration reveal that it was principally intended by Congress to force public disclosure of documents and recordings related to what has come to be known as the "Watergate affair."

Second, in an effort to rescue a law that was drafted in great haste, the appellees urged the district court to narrow its inquiry on the totally fanciful hypothesis that the Administrator might promulgate implement-

[5] *See, e.g.,* Motion of the Federal Appellees To Affirm, p. 15 ("Legislation regarding the materials from appellant's term as President is supported by the strong need for access by government officials to the materials as well as for general historical purposes."); Motion To Affirm of the Reporters Committee, et al., pp. 18-19.

[6] *See, e.g.,* J. S. App. 48a-49a ("The simplest way of describing the public interests served by the Act is to merge all of them under the rubric of preservation of an accurate and complete historical record.")

ing regulations that would moot appellant's claims. The district court accepted this contention, and its lengthy opinion focuses upon a single limited constitutional question which, in its view, was the only issue ripe for decision. Although such a tunnellike view of this case reduced the district court's burden, it mischaracterizes the true and immediate impact of the Act on the appellant and on those who have succeeded and will succeed him in the Presidency.

Third, the case arrives here while public passions are still high. The admonition first delivered by Mr. Justice Holmes in *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400-401 (1904), and quoted by Mr. Justice Harlan in his dissent in *New York Times Co.* v. *United States,* 403 U.S. 713, 752-753 (1971), seems prophetically to fit this case:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

It is difficult to believe that a Congress not preoccupied with what it called the "Watergate affair" would have chosen to "preserve" presidential materials in the manner that this Act does. Yet Congress' hasty decision, enacting into law the public's "immediate interests," now subjects this Court to the "hydraulic pressure" that, in Justice Holmes' view, causes "even well settled principles of law [to] bend."

I

Among the most firmly settled principles of constitutional law is the doctrine of separation of powers. James Madison, in The Federalist No. 47, described it as an "essential precaution in favor of liberty" and as "the sacred maxim of free government." Paraphrasing the metaphor utilized by this Court in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), separation of powers means that each of the three branches of government is "master of its own house." It is difficult to conceive of any subject that is more clearly a matter of internal housekeeping and, therefore, exclusively within the control of each branch of government, than the custody and disposition of materials that reflect the internal operations of that branch. The manner and content of the deliberative process of the Presidency is not subject to control or intrusion by Congress. Consequently, Congress has no power to dictate the terms for disposition of the materials which are a part of that process.

1. Notwithstanding the district court's characterization, our separation of powers argument does not proceed from the notion that the three branches are "airtight" compartments that have no relation with one another. Rather, we argue that the test is one of interference by one branch in matters that are inherently part of the internal affairs of another. The President has various powers that he may exercise without accounting to the Congress for his reasons: the veto power and the power to make executive and judicial appointments are but two examples. Congress surely may not force a President ever to disclose publicly *why* he has vetoed a law or *why* he has selected one candidate for appointment over another. It likewise cannot place

the decision to disclose such matters in the hands of a subordinate executive officer and prescribe the terms he is to follow. In this regard, the interference is no less an encroachment on presidential prerogative than was the Tenure of Office Act of 1867, which this Court declared unconstitutional as an infringement upon the President's exclusive powers in *Myers* v. *United States,* 272 U.S. 52 (1926). And the historical circumstances underlying this law—a reaction by Congress to a Chief Executive to whom it was hostile—are strikingly similar to those that prompted enactment of the Tenure of Office Act.

2. Our basic separation of powers claim is buttressed by the necessary impact of this law upon the confidentiality of presidential communications which this Court recognized in *United States* v. *Nixon,* 418 U.S. 683 (1974), as "rooted" in the President's Article II powers. In a major respect, this case is the converse of *United States* v. *Nixon,* in that the Act seizes *all* presidential conversations in a "broad, undifferentiated" manner, and authorizes restrictions upon publication only where a privilege is affirmatively established. We submit that the privilege recognized by this Court in *United States* v. *Nixon* extends to all records of the "internal operations" of a President's office—whether or not they are communications made directly to the President. Public disclosure of such memoranda or correspondence will seriously inhibit the freedom with which presidential advisers, or those who deal with them, will exchange ideas. This is particularly true if, rather than being presumptively privileged, internal presidential documents are to be disclosed *unless* an incumbent or former President succeeds in affirmatively establishing that they should remain confidential.

3. We argue below that the distinction drawn by the district court between an incumbent President and a former President, for the purpose of presidential confidentiality, is not supported by any policy or precedent. The privilege recognized in *United States* v. *Nixon* is designed to foster total confidence in a particular relationship. Like other confidentiality privileges, it must endure beyond the termination of the relationship. The United States now concedes that even if a former President dies the privilege survives and attaches to the communication. The presidential privilege should not be confused—as the district court confused it—with the privilege that shields state secrets. Such an informational privilege may be exercised only by an incumbent because he is in a unique position to evaluate the harm that will be caused by disclosure.

4. Our view regarding the inherent nature of the President's authority to control the record of internal operations of his office is supported, as well, by the unbroken tradition recognizing a President's "ownership" of his presidential materials. Such a tradition constitutes the "usage" which may clarify and serve as a "gloss" on broad constitutional language. As long ago as 1841, the principle of individual ownership of presidential papers was accepted by Mr. Justice Story. And it has been repeatedly approved by congressional acquiesence and by deliberate legislative enactments designed to induce former Presidents to transfer their presidential materials to the government.

5. The district court maintained that notwithstanding the claim of presidential confidentiality that could be made with regard to some of these materials, there were substantial "public interests" justifying Congress' action, and these "public interests" outweighed

the intrusion on presidential confidentiality. We contend, however, that this "balancing test" of interests is an erroneous standard by which to decide whether the separation of powers principle has been violated. None of the separation of powers decisions issued by this Court, down to its recent decision in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), turned on a "balancing of interests," and such an analysis misapprehends the constitutional issue. The question is not whether a particular encroachment by one branch or another is justified, but whether there has been an encroachment at all in light of the historical allocation of functions.

Moreover, the "important public interests" referred to by the district court do not withstand close scrutiny. The principal interest that is cited—"preservation of historical materials"—is a highly debatable proposition when applied to the deliberative process of government, which requires confidentiality. It is the task of each branch to decide, on its own, whether the interests of historical "research" warrant the loss of confidentiality that accompanies the historian's curiosity. Nor does the "interest" of making documents available for ongoing government business withstand analysis. In two hundred years, ongoing government business has never occasioned an incumbent's access to all of the personal, political and official files of his predecessor. If the issue should ever arise as to particular items, it can be worked out informally between the incumbent and the former President—as it has been in the past—or formally, if necessary, in accord with the rule announced by Mr. Justice Story that implies a legal obligation on a former President to permit access to specific papers needed for current government use.

6. Our final separation of powers argument is that the Act must be invalidated not only because it directly inhibits presidential activity that is inherently part of the Chief Executive's function, but also because it sweeps far beyond the materials and the remedies needed even to achieve Congress' stated objectives. We argue that legislative encroachments on executive power must be judged on their face, like statutes dealing with free expression, because the constitutional danger in both instances is that constitutionally guaranteed activity will be "chilled." By this standard—as well as by the standard requiring that legislation affecting constitutionally secured liberties be narrowly tailored to achieve legitimate ends—the Act is impermissibly broad.

II

In a second respect—also related to the separation of powers doctrine—the Act is a highly unusual exercise of legislative authority. Congress dealt not with the subject of presidential materials generally. Instead, it limited the Act, by specific reference, to the materials of Richard Nixon. It is clear from the legislative history and from various references in the opinion of the district court, that the reason for the Act was Congress' distrust of the former President and its allocation of personal blame to him. On this account, he was apparently thought by Congress to be an unreliable custodian of the materials of his Presidency.

Such a legislative judgment of individual distrust or culpability conflicts with the important separation of powers principles that underlie the constitutional Bill of Attainder Clause. The policy of that Clause was discussed extensively by this Court in *United States* v. *Brown,* 381 U.S. 437 (1965), and it was concluded that

the Constitution prohibits "trial by legislature" and requires that questions regarding the blameworthiness of individuals be decided by courts and juries. It is Congress' function to enact "generally applicable rules." By this standard it might permissibly have provided for the transfer of records of any federal official *found by a court* to be an unreliable custodian. But, as noted in the *Brown* opinion, Congress "cannot specify the people upon whom the sanction it prescribes is to be levied." 381 U.S. at 461.

Richard Nixon has been "specified" in violation of this principle. Since the purpose of a judicial trial or quasi-judicial proceeding is to afford a party subject to a governmental order an opportunity to be heard, to present a defense, to cross-examine witnesses, and to argue questions of law and fact, the deprivation of these procedures by "legislative trial" is highly prejudicial. There were no hearings by the Senate or House to consider the "unreliable custodian" allegation. Congress reached its conclusion from the evidence it had secured in the course of various "Watergate" investigations, and on that basis formed an individualized judgment regarding Mr. Nixon.

Finally, there is no substance to the argument, adopted below, that the Bill of Attainder Clause can be violated only by "punishment" in the literal sense. This Court in the *Brown* case held that "preventive" legislative actions directed at specific individuals or groups violate the Bill of Attainder Clause as surely as "vindictive" or "punitive" laws. Here it was Congress' desire to "prevent" Mr. Nixon from exercising the authority of ultimate control and disposition over his presidential materials. That was an adequate "preventive" purpose to call the Bill of Attainder Clause into

play. Moreover, the personal consequences of this wholesale seizure of his papers and effects is enough of a personal injury to the former President to qualify as "punishment" by traditional standards.

III

The district court believed that "the most troublesome challenge" to the Act's constitutionality related to its effect on the former President's right of privacy. The unique needs of the Presidency—a job which requires its occupant to be available and protected around-the-clock—make it difficult for any individual holding that position to keep his private thoughts and communications physically separated from his official records. Furthermore, the district court recognized that Mr. Nixon had every legitimate expectation that, at the end of his service, he would be permitted to review the materials of his years in office and remove from the files those items that were entirely personal. This procedure had been followed by every President who preceded him since the birth of the Republic, and it had been ratified by congressional and judicial action and acquiescence. Yet there are now among the materials that have been seized, beyond the former President's power of removal, personal notes from his daughters, private correspondence with friends, relatives and former law partners and—most private of all—tape recordings of family conversations and of personal and political thoughts which Mr. Nixon often dictated for future recollection at the conclusion of his working day.

This Act seizes all these materials in total and establishes a procedure whereby they will be meticulously

reviewed and transcribed by a large number of government employees whom Mr. Nixon does not know and whom he has never authorized to intrude into his personal life. This sequence, under which material is first seized and searched and, only after the intrusion is completed is the decision made as to which items should be kept and which returned, is identical, in every significant regard, to the "general warrant" that was a principal target of the prohibitions contained in the Fourth Amendment. The vice of a general search is particularly aggravated when the items being searched are an individual's written or recorded thoughts—reflected in his "private papers"—for these are the very essence of privacy, as is demonstrated by eloquent judicial declarations ranging from the classic ruling in *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765), through Mr. Justice Brandeis' dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928), to observations by Judges Learned Hand and Henry Friendly.

Granting, *arguendo,* the legitimacy of Congress' interest in securing official documents in order to maintain a complete historical record, neither the arguments on this case nor the legislative history of the Act contains a valid reasons why the former President should not be given the same opportunity afforded to any individual upon whom a subpoena is served to sort out those items that are sought by the official demand from those that have no bearing upon it. Indeed, at least one of the analogies relied upon by the district court—the A.L.I. Model Pre-Arraignment Code—explicitly provides this protection for privacy even in the case of a criminal investigation.

The district court's attempt to analogize the seizure accomplished by this Act to the electronic surveillance authorized by federal law is unsound because the target of such surveillance obviously cannot be relied upon to notify those listening which conversations constitute evidence of crime. Moreover, electronic surveillance is authorized by federal law only pursuant to six "precise and discriminate" statutory requirements that are essential preconditions to constitutionality. None of the six is provided by this Act.

In addition to violating Mr. Nixon's Fourth Amendment right to privacy, the Act intrudes into thousands of conversations and documents that are purely political in nature. The President is, at the same time, the Chief Executive of the United States and the head of the national political party he represents. Mr. Nixon had numerous conversations during his Presidency which were strictly in the area of political association and did not constitute the execution of official duties. The involuntary disclosure of all such conversations and all such documents to the many government employees involved in the review process, and their possible ultimate disclosure to the public, violates rights guaranteed by the First Amendment. And the combined effect of the intrusion on privacy of an individual who occupies this political post has the same constitutionally impermissible consequences as this Court has discerned in various circumstances involving an intersection of the First and Fourth Amendments—most notably in the relatively recent ruling declaring unconstitutional warrantless wiretaps conducted for "domestic security" purposes. *United States* v. *United States District Court,* 407 U.S. 297 (1972).

ARGUMENT

Preliminary Statement

Before turning to a discussion of those areas in which we challenge the constitutionality of Congress' hasty and ill-conceived legislation, we believe it is important to describe what the Act reaches and how it works so as to evaluate its immediate impact on the appellant.

A. The Materials at Issue

A description of the nature of the materials that this Act reaches demonstrates, we believe, that Congress has interjected itself into the internal operations of the Presidency in a way that may alter the future political and professional careers of hundreds of individuals and that sanctions a massive intrusion upon the private lives of Mr. Nixon, his family, and scores of others who communicated with him assuming that their conversations were confidential. In keeping with the structure of the Act, which separately authorizes the seizure of Mr. Nixon's recorded conversations and the seizure of all other presidential material, we first discuss the content of the recordings and then the nature of the documentary material.

1. *The tape recordings*

Section 101(a) of the Act directs the seizure of some nine hundred tape recordings which contain nearly every conversation that took place over the course of two and a half years in the former President's offices, in certain parts of his residences, and on various telephones serving those areas (App. 218). These recordings are most central to the issues raised by the Act

because they involve highly intimate and confidential discussions. Because the recordings were voice-activated (App. 218-220), they even contain Mr. Nixon's private dictations of his personal diary.[7] Mr. Nixon described his dictated diary as follows (App. 178):

> During various periods during my years as President I recorded dictabelts at the end of the day on which I expressed my own reflections, thoughts, ideas and concerns with regard to the activities and events of that day. I considered this dictation exceedingly private and would therefore express many thoughts and opinions which I would not have conveyed to any but my closest friends and some to none other than my personal secretary. At times I expressed my frustrations, my feelings of exhilaration, or other emotions experienced throughout the day....

The recordings also contain frequent conversations between Mr. Nixon and his wife and daughters concerning highly personal matters, candid discussions of his health with his physicians, and talks concerning innumerable private interests with his clergy and attorneys. These personal conversations are interspersed throughout the recordings, making it impossible to listen to any of the tapes without being continually exposed to intimate communications (App. 211-218). Even a single conversation often encompasses a wide variety of topics. As Mr. Nixon explained (App. 177):

> On occasion, for example, I would meet with a member of Congress whom I counted also as a close personal friend. During such a meeting we might discuss matters pending before Congress, political

[7] The materials seized by the Administrator also contain most of the actual unlabeled dictabelts of the former President's personal diary (App. 178).

> matters of interest to us both, or personal matters having to do with our families, our respective interests in business, or any other thing that was on our minds.

The district court minimized the significance of the Act's seizure of the former President's private conversations by stating that it had "no estimate by Mr. Nixon of what percentage of the conversations implicate Mr. Nixon's privacy rights" (J.S. App. 71a), and by assuming that "recordings made in the offices for use by the President must surely relate primarily to the conduct of the presidency" (*id.*). The district court was wrong in three respects. *First,* the tapes include conversations that took place in portions of Mr. Nixon's residences as well as in his offices. *Second,* although Mr. Nixon did not estimate the specific percentage of personal conversations on the tapes, he did inform the court that (App. 177) (emphasis added):

> The conversations I had in the Oval Office and in the Executive Office Building *frequently* included discussions of purely personal matters. . . . I had such conversations *nearly daily and often several times during the course of a day* with my wife, my daughters, personal friends, close staff members, and other persons.

Third, the district court implicitly concluded that any conversations not involving purely personal matters must relate "primarily to the conduct of the presidency" (J.S. App. 71a). What the court did not mention is that the recordings are replete with conversations involving purely partisan politics. As Mr. Nixon put it (App. 174) (emphasis added):

> [I]t was also my practice in my role as head of my political party to engage in *extensive and fre-*

> *quent discussions* with members of my staff, members of Congress, other officials of government, governors and state officials and personal friends and associates *concerning a multitude of political matters*. . . . Such discussions included, for example, whether I should support certain candidates for elected office and, if so, what form that support should take. In these discussions purely personal matters were often inextricably intermixed with political matters, and it would be virtually impossible to separate the various combinations of views and opinions expressed in them.

By categorizing a President's conversations as either purely personal or primarily related to the conduct of the Presidency, the district court transformed all political discussions—the largest category of conversations on the tapes—into official conversations. Freewheeling political discussions concerning, for example, whether to remove the incumbent Vice President from the Republican ticket in favor of another political figure, have become—under the district court's opinion—related to the conduct of the Presidency. Similarly, discussions concerning whether to support particular state officials in their campaigns for federal office—and all the personal data such political decisionmaking involves—are not, by the district court's standard, private.

In short, the two and a half years of Mr. Nixon's recorded conversations seized under the Act embody virtually every aspect of his daily life: from his late-night diary dictations of his private thoughts, to his legislative strategy sessions with his staff; from his counseling with family members, to his political brainstorming with party officials; from his social dialogue with close friends, to his phone calls of condolences to families of prisoners of war. Every attitude, emotion

and privately expressed thought, every unguarded personal reference, and every confidential exchange of ideas have been captured on the recordings. There is little wonder that journalists, authors, playwrights, and historians who stand ready to dissect, analyze and criticize every aspect of the former President's life would try so diligently to gain public exposure of such material, or that various Representatives and Senators would assist them in that effort. It is also little wonder that those who now defend the Act's constitutionality downplay this enormous intrusion upon the lives of Mr. Nixon and those with whom he spoke, by repeatedly emphasizing the millions of documents seized under the Act instead of the recordings. However, the constitutional claims presented here must be specifically analyzed in light of the fact that the recordings—seized separately under Section 101(a)—constitute material of extraordinary confidentiality and sensitivity.

2. *The documentary material*

Section 101(b) of the Act directs the seizure of all the other materials of Mr. Nixon's Presidency. Although the amount of such documentary material has been estimated at inflated figures as high as 42,000,000 pages, the figure is not so overwhelming when its components are viewed separately.

A major portion of the documentary material—some 7.3 million pages—consists of birthday, anniversary and special occasion greetings to Mr. Nixon and his family, children's letters, public opinion mail, and extra sets of GPO publications.[8] A second major component—

[8] The materials include, for example, several boxes of mail addressed to Mr. Nixon, received prior to August 9, 1974, which to this day have not been forwarded to him.

some 11.4 million pages—are files containing copies of various kinds of communications among the numerous executive departments. These are documents currently duplicated in the permanent files of the corresponding agencies.

The remaining materials are those which, in varying degrees, bear directly upon the internal operations of a President's office. They include, for example, the files of individual staff members, files of correspondence between Mr. Nixon and persons in both the private and government sectors to whom the former President looked for advice and recommendations, and Mr. and Mrs. Nixon's own files. Although the full panoply of items found among a President's materials defies detailed description and, indeed, will vary from one administration to the next, a general overview can be gained by a brief description of the internal operations of the President's office. Such a review itself helps to explain why, for two hundred years, departing Presidents have taken with them the papers they accumulated while in office and why that practice has not disrupted the ongoing affairs of government.

(a) *The White House Filing Systems*

First, the President's office is not an office of record. The originals of records of all actions by the President in his official role are preserved elsewhere, or are reflected in official publications of the government. For example, an enrolled bill signed by the President is maintained at the National Archives. Presidential vetoes or messages to Congress are lodged with the Clerk of the House and/or the Secretary of the Senate. Presidential pardons are filed with the Justice Department, and military commissions are recorded in the Department of Defense. In other words, every official action of the President is documented by materials permanently maintained by offices other than the White House (App. 201).

In addition, background documents relating to the President's functions are located in the permanent files of the various executive agencies. The originals of White House correspondence or memoranda to agencies or departments of the government are retained by those offices, and the copies of agency or department correspondence and memoranda to the White House similarly are filed permanently with the originating agency. Consequently, if a new administration needs, for example, to determine what action a prior President has taken with respect to imposing import quotas, the permanent files of the Commerce Department reflect it. What the new administration likely will not find in the Commerce Department's files are the various political options underlying the action, the discussions the President had with his own staff concerning those options, or his own analysis of the considerations he took into account in determining what course to follow.

Even within the Executive Office of the President —as distinguished from the President's own White House Office [9]—the files are retained from one administration to the next. Divisions within the Executive Office, such as the National Security Council, the Central Intelligence Agency, the Office of Economic Opportunity and the Office of Emergency Preparedness,

[9] With the creation of the Executive Office of the President in 1939, the "White House Office," which serves the President in the performance of the many activities incident to his immediate office, became a division of the umbrella Executive Office but remained, as it always has been, a separate entity with its own clerical staff, budget, files, *etc.*

maintain their own files, have their own budgets and staffs, and retain their files from one administration to the next. In some instances, such as the National Security Council, where the President sits as the functioning head of the office, the office maintains, in addition to its "institutional" files, a set of files specifically for the President. These presidential files are removed by the departing President at the end of his term. The institutional files are retained (App. 198-210, 398-403).

In sum, only the materials of the President's own White House Office are removed during transitions. It is only those files that historically have been subject to disposition in accordance with the desires of the President who accumulated them.[10] Thus, when a former

[10] The White House filing system has typically consisted of three segments: (1) the "Central Files", (2) files maintained by individual staff members in their respective offices, and (3) the personal files of the President maintained by his own secretaries. The Central Files, which is the main filing system, consists primarily of incoming correspondence processed by the White House mailroom and copies of outgoing correspondence reports, memoranda, etc., generated or received by the Office of the President and the various White House staff offices. Most of the incoming correspondence consists of letters to the President from private citizens; it also includes letters from state and federal officials, members of Congress, officials of foreign countries, and letters addressed to White House staff members other than the President. During the Nixon administration the Central Files were further subdivided to safeguard unwarranted access to confidential material (App. 403-406). A "Special Files" unit was created to house the following kinds of material:

(1) Investigative reports on individuals.
(2) Applications and recommendations for positions.
(3) Documents containing derogatory remarks concerning the character, loyalty, integrity, or ability of individuals.
(4) Documents concerning personal, family or financial affairs of individuals.
(5) Documents containing information which could be used to harass living persons or relatives of recently deceased persons.
(6) Information prejudicial to the national security.
(7) Information prejudicial to foreign relations.
(8) Communications addressed to the President in confidence, the immediate publication of which would result in discouraging confidential communications to a President in the future.
(9) Documents pertaining to the President's personal, family, business, and financial affairs.
(10) Security-classified information.
(11) Documents specifically restricted by the President.
(12) Politically sensitive information or documents.

President takes his papers and effects with him upon leaving office, the business of government is not disrupted. The permanent files of the various government agencies and departments are fully sufficient for the needs of the new administration to take up where the earlier administration left off or to strike out on its own with new policies and programs.

(b) *The Content Of The Documents*

When we turn our attention from the millions of greeting cards, publications and agency-duplicated documents to the more limited amounts of material truly central to this case, we find that the former President's files encompass the same spectrum of matters as the recordings seized under Section 101(a). The former President's own description of the materials he and his staff accumulated—which we refer to more specifically in our discussion of appellant's privacy and First Amendment rights (pp. 141-176, *infra,*)—highlights the scope of the materials. They range from such items as handwritten notes received from his daughters and correspondence with members of his law firm, to hundreds of political "briefing books" containing bio-

graphical backgrounds, personal vignettes, and other information for the former President's use in meetings with countless individuals. They also include handwritten drafts of his State of the Union messages and memoranda concerning positions to be taken on the veto of legislation.

The former President's description of the materials of his office deals mainly with those generated or retained by him or by persons with whom he worked closely. However, also among the documents a President's staff customarily accumulates are materials with which the President has less personal contact but which are nonetheless vital to the operations of his office. Here too, the variety is so large that a sampling can only scratch the surface. They include:

(1) The legal files of the President's Counsel.

(2) Republican political files and research reports.

(3) The files of the President's personal lawyer, James St. Clair.

(4) Memoranda to the President for his information, review, and decision including proposed decisions and instructions.

(5) Letters from citizens responding to requests for names of potential political appointees.

(6) Background files concerning proposed presidential appointees.

(7) Memoranda to the President on drug abuse.

(8) Constituent advice on campus unrest.

(9) Looseleaf notebooks containing replies to White House questionnaires.

We believe the best general description of the papers of a President was provided by the late Professor Herman Kahn in testimony before a House subcommittee.[11] Dr. Kahn stated:

> My own experience persuades me that much of the debate now going forward on this subject [of ownership of presidential papers] is of small value because the persons engaged in the debate have little reason to have knowledge of the true character of the Presidential papers they are talking about. . . . [I]t has been a part of our unwritten Constitution since the days of John Adams that the President of the United States is not only Chief Executive, Commander in Chief, and Chief of State, but is also a head of a political party. This is a fundamental requirement for the successful operation of our political system. But it is a corollary of that fact that at least 50 percent, probably more, of what we call the President's papers are political rather than governmental in character. I use the word political here not in any derogatory sense but in its truest and highest sense, as meaning public leadership, the successful functioning of party activities, and the marshalling of public and political support for the President's policies, programs, views, and the issues that he lays before the public. These are not records of governmental action. They are ancillary to and related to Government as all politics is related to Government, but they are not governmental records in the sense that they are records created by the President in the course of carrying out acts of Congress or otherwise acting in his formal constitutional capacity as Chief Executive or Commander in Chief. Because of the nature of his office, political matters inevitably are diffused through a very large part

[11] *Hearings on P.L. 93-526 Before the Subcomm. on Printing of the Comm. on House Administration,* 93d Cong., 2d Sess., 93-94 (1974).

> of what we call the papers of the President. . . . I am convinced it is the lack of understanding of this fact which has led many well-intentioned people to take the position that all of the President's files ought to be treated as official public records.

B. The Effect of the Act

We turn now to an examination of the terms of the challenged statute. The court below focused its attention on Section 104, which sets forth the standards relating to public access to the presidential materials. Summarizing the operative provisions of the Act, the court stated (J.S. App. 20a):

> The Act in terms merely directs GSA to take custody of the materials that fall within the scope of section 101, and to promulgate regulations after taking into consideration the seven factors listed in section 104(a).

Since it believed the Act "merely" produced these limited consequences, the district court viewed the principal question before it as being (J.S. App. 28a)

> whether the process by which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional.

This limitation was erroneous because the Act has a much broader immediate impact on accessibility to presidential materials. Portions of the law other than Section 104 have severe constitutional consequences that must be weighed in any appraisal of the Act's validity.

1. *The definition of "presidential materials."*

Section 101 describes the materials that are subject to the provisions of the Act. The breadth of the statutory definition is immense. In addition to the tape recordings, the law directs the Administrator to "receive, retain, or make reasonable efforts to obtain complete possession and control" of any documents or objects "which constitute the Presidential historical materials of Richard M. Nixon." The Act then borrows the definition of "historical materials" in 44 U.S.C. 2101, which covers any item "having historical or commemorative value."

Quite obviously any paper or thing that has passed through the President's office at any time has "historical or commemorative value." Indeed, the court below acknowledged this fact when, responding to the argument that the statute was overbroad, it said: "Virtually any item might be needed by a historian, depending upon what subjects seem fit to study some years from now" (J.S. App. 62a).

Congress was not oblivious to the breathtaking scope of this seizure. In the course of floor debate on the Act, Senator Percy referred the Senate to a bill (S. 1926, 93d Cong., 2d Sess. (1974)) that had been introduced many months previously and that would have dealt in far more discriminating fashion with documents generated by or for a public official (such as a President) during his term in office.[12] The proposed bill was

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[12] The proposed bill's definitional section included the following (emphasis added):

> (2) "public documents" means, with respect to an elected official of the United States, the books, correspondence, documents, papers . . . and other objects or materials retained by an individual holding elective office under the United States and

ultimately offered as a floor amendment by Senator Griffin, who stated that it "would extend general principles involved in the bill before us to all Presidents, Vice Presidents, Senators and Congressmen." 120 Cong. Rec. 18245 (1974). Senator Ervin, successfully moving as floor manager to table the amendment, replied by saying (120 Cong. Rec. 18246 (1974)):

> If we attempt to put too much of a burden on one little nag that has to make a speedy journey we prevent the necessary speed being made, and it might break the back of the nag and I, therefore, move to table this amendment. . . .

For reasons specified in this brief, we believe that even a carefully tailored restriction—such as the proposed Griffin Amendment—upon a President's authority to dispose as he sees fit of the papers reflecting the "internal operations" of his office may violate the separation of powers principle. In this case, however, no such close question is presented. Congress' impoundment was not limited to documents "originated . . . in connection with the transaction of public business;" it covered every paper or thing "having historical or commemorative value."'

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which were prepared for or originated by such individual *in connection with the transaction of public business during the period when such individual held elective office and which would not have been prepared if that individual had not held such office.* The "elected official" would have reviewed his own material and deposited with a designated trustee those which he determined to be "public documents." The proposed law also provided that the official could demand an agreement barring specified "public documents" from "public access" for a period of up to 25 years "as may be necessary to protect confidentiality of communications or to save embarrassment to any individual."

2. How the materials will be processed.

The tape recordings of Mr. Nixon's conversations are described by the General Services Administration's March 1975 Report to Congress as "representing an estimated 5,000 hours of telephone and personal conversations." The GSA intends to make three duplicates of each of these tapes and to reduce to written transcript their full content—including those portions containing conversations that are entirely personal and private. The transcripts will then be subjected to revision and to review on several levels—after which new duplicate copies of the tapes will be produced. The GSA will permanently retain the complete original of all recordings, giving the former President a copy of the portions containing private conversations.[13]

The GSA Report contains two diagrams—reproduced on the following pages—which illustrate graphically the extent to which Mr. Nixon's personal conversations will be pored over by a GSA staff of lawyers, stenographers, and archivists, subjected to close scrutiny for transcription purposes, and ultimately preserved on several tapes that will be kept in the permanent custody of the GSA. Indeed, the second of the diagrams hypothesizes that the transcribers of a tape will spend more intensive effort on determining the precise words used by the speakers in "private or personal" taped conversations than in those conversations which are of a "general historical" interest. And the extent of the intrusion into highly confidential communications with presidential advisers is demonstrated by the "50:1" and "20:1" ratios contemplated for review of those discussions.

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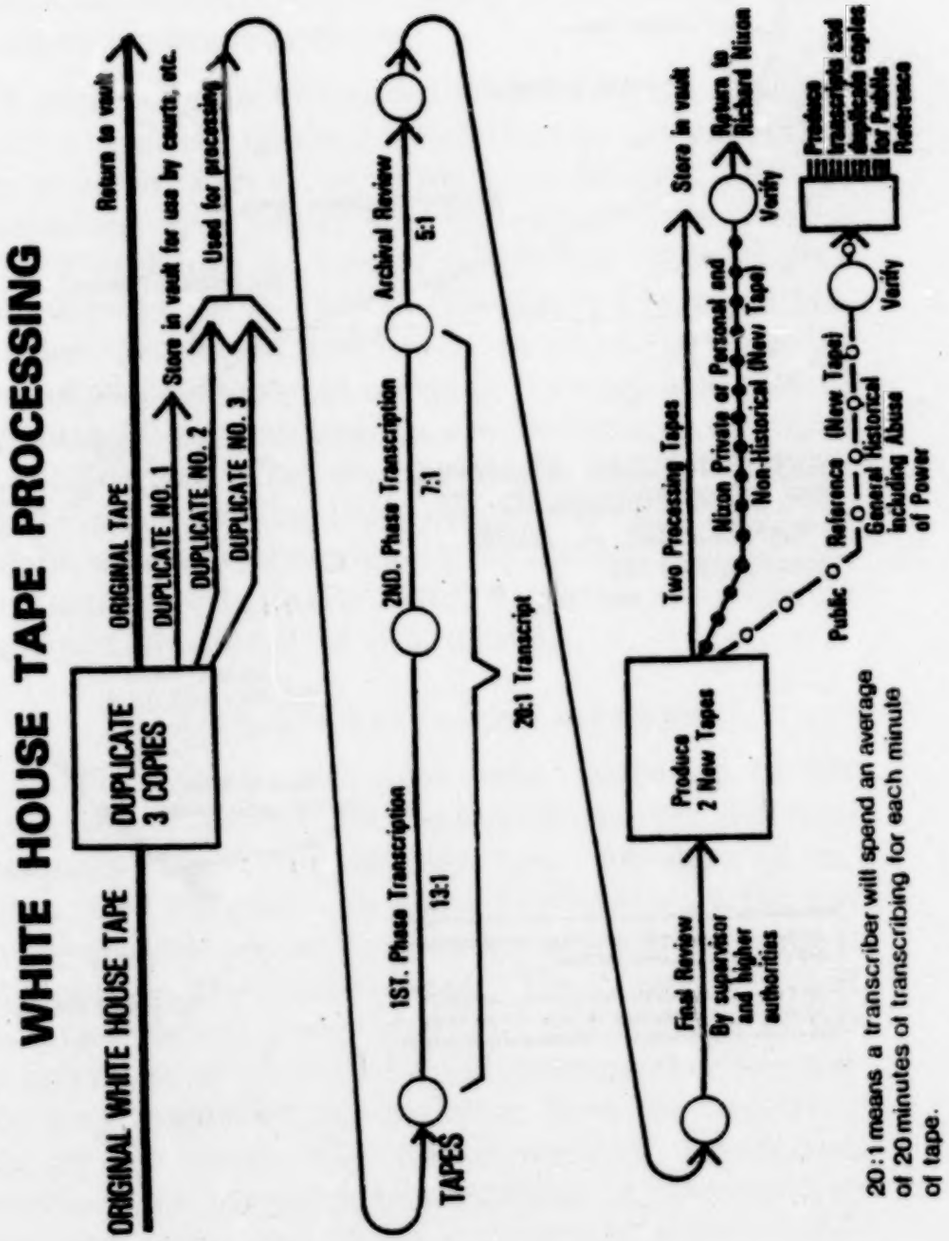
[13] GSA Report to Congress, March 1975 (pp. E-5, E-6).

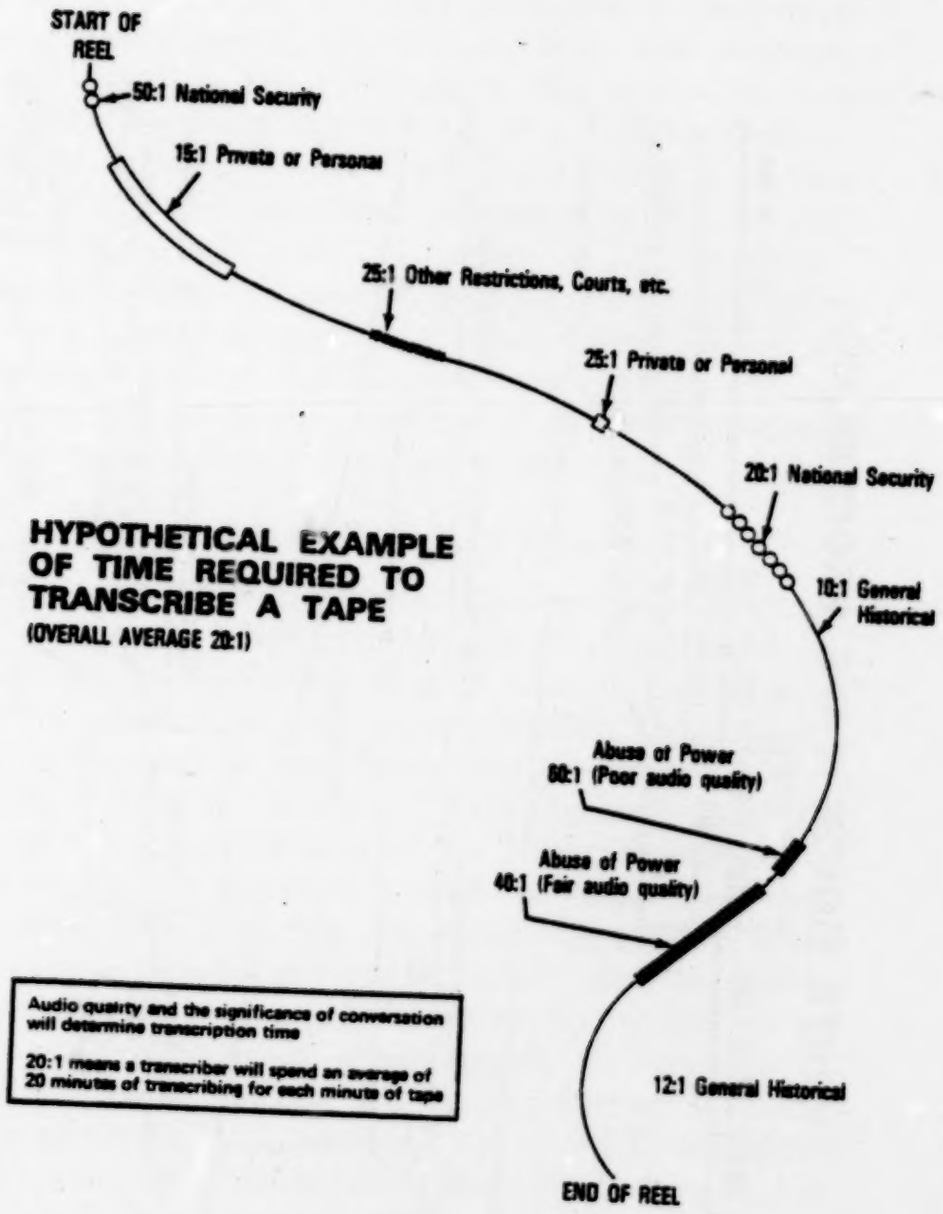
Congress could, of course, have acted with more precision in this area and have subjected to permanent government control and transcription only conversations related to the "Watergate affair" or only those directly involving the exercise of presidential duties. Had it done so, a serious separation of powers question would still have been presented in view of each President's right to be the "master in his own house." This law, however, goes far beyond limited intrusions resting upon legitimate public interests. Congress has impounded *all* of Mr. Nixon's conversations for permanent recording and analysis of even the most intimate conversations and sensitive discussions.

3. *Access by federal officials.*

The court below substantially ignored Section 102(d) of the Act, which has an immediate effect and which has given rise to regulations that are now in full force. It grants access to the impounded materials "at all times" to "any agency or department in the executive branch of the Federal Government." This places the most confidential communications of the Nixon Presidency at the disposal of executive branch personnel in succeeding administrations. The Act sets no standard for access other than "lawful government use," [14] and the regulations adopted by the Administrator apparently do not contemplate the denial of any request for access by executive branch officials. All the regulations require is that access be "documented" (41 C.F.FR. 105-63.206 (b)), and that classified documents not be seen by anyone having a lower security clearance than the highest

[14] The court below defined "lawful Government use" as meaning use that is constitutional—obviously an unexpressed element in every statutory provision (J. S. App. 26a-27a n. 18).





classification degree of the documents being examined (41 C.F.R. 105-63.206(c)). Moreover, the definitional provisions would grant automatic access to personnel of independent administrative agencies on the same basis as executive branch officials.

Again, Congress has moved too broadly, too precipitously and too thoughtlessly. Can there be any doubt that the prospect of an examination of confidential political discussions by a future administration would deter a candid exchange of views among those surrounding and advising an incumbent President? The seven factors set forth in Section 104(a) on which the court below relied so heavily as securing the confidentiality of presidential communications are limitations only upon "public access." They do not apply to executive branch access under Section 102(d), and it is clear from the Administrator's promulgated regulations that he will not supply voluntarily what Congress deliberately omitted from the text of Section 102.

4. *Availability to judicial subpoena.*

Section 102(b)—also given scant attention by the court below—directs that the recordings and historical materials "shall, immediately upon the date of enactment of this title, be made available . . . for use in any judicial proceeding or otherwise subject to court subpoena or other legal process." The "availability" of such materials is made "subject to any rights, defenses or privileges which the Federal Government or any person may invoke." It is not clear from the legislative history or from the Administrator's regulations whether this provision was *intended* to alter existing law and make Mr. Nixon's materials *more* readily available than those of any other President to subpoena

by private litigants. It is plain, however, that the enactment does, in fact, affect the availability of the materials to subpoena in significant respects. Mr. Nixon is no longer the custodian of these documents, and subpoenas may, therefore, be served on the Administrator. If the former President wishes to be heard on the question whether the subpoena should be executed or quashed, he is now in the role of intervenor and thus incurs additional procedural hurdles and loses various defenses which might otherwise apply. *Compare, e.g., Donaldson* v. *United States,* 400 U.S. 517 (1971); *Reisman* v. *Caplin,* 375 U.S. 40 (1964).

More serious, however, is the fact that the Act's seizure of the materials from a former President to facilitate their "availability" for judicial proceedings has been looked upon by various courts as freeing the materials from virtually any restraints based on confidentiality of presidential decisionmaking. The result has been that in a number of cases courts have ordered presidential materials to be made available to private litigants with gossamer-thin assertions of need to overcome the presidential privilege.

In *Sun Oil Co.* v. *United States,* 514 F.2d 1020 (Ct. Cl. 1975), for example, the plaintiff oil companies, complaining of an allegedly improper denial of a drilling platform permit, demanded access to four memoranda to President Nixon from his advisors. Notwithstanding this Court's unequivocal and repeated recognition of a "presumptive privilege" for such communications in *United States* v. *Nixon,* 418 U.S. 683 (1974), the Court of Claims held that the oil companies were entitled to the confidential memoranda because:

> These papers might well lead to the discovery of admissible evidence and are suggestively relevant to the subject matter of this action. 514 F.2d at 1025.

In another case the district judge, over a claim of presidential privilege, granted a demand by civil plaintiffs for discovery of *all* of President Nixon's conversations occurring over more than a one-month period that may have pertained to the May Day demonstrations of 1971. *Dellums* v. *Powell,* 70 F.R.D. 648 (D.D.C. 1976), *appeal pending* (D.C.Cir. No. 76-1336).

Most recently, a trial commissioner in the Court of Claims, over a claim of presidential privilege, ordered a government search of all of Mr. Nixon's presidential files in GSA's custody pertaining to the preparation of the budgets in each year of Mr. Nixon's Presidency so that various companies complaining of alleged breaches of their helium conservation contracts could learn the motivations and budget considerations which may have led to their terminations. *National Helium Corp.* v. *United States* (Ct. Cl. No. 158-75); *Cities Service Helex, Inc.* v. *United States* (Ct. Cl. No. 138-75), *appeal pending* (Ct. Cl. Nos. 158-75, 138-75).

5. *Mr. Nixon's access.*

Section 102(c) appears to provide appellant with access to his presidential materials, and the court below read the statutory provision as making them fully available, with a right, on his part, to reproduce them (J.S. App. 13a). In fact, however, the Act authorizes such access only "subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103." The Administrator's regulations (41 C.F.R. 105-63.206(b)) require the former President, on each occa-

sion when he wants to examine his materials, to state his "reason" for examining them, and a record is to be kept of all his activities during the period of the examination. Such requirements constitute a substantial inhibition upon his recourse to the materials. Similarly, the Act's directive to GSA to locate the materials in Washington, D.C., or its metropolitan area, creates an additional impediment to access since the materials will be sequestered some 3,000 miles from Mr. Nixon's home. Past Presidents were able to study and use their materials by depositing them in a facility or at an educational institution near their homes. Under the depository agreement Mr. Nixon intended to have his materials temporarily placed in a federal facility near his California residence (J.S. App. 134a-135a). The Act unnecessarily deprives him of this ready availability and makes his access contingent upon procedural obstacles that are unjustified.

6. *Conditions for public access.*

We have enumerated above many respects other than public access by which the law cuts deeply into a President's authority to deal with documents and objects relating to the "internal operation" of his office. These other provisions—which overbroadly restrict Mr. Nixon's rights and grant unjustified access to individuals and bodies other than the general public—would, even without the law's "public access" section, invalidate the Act. The court below, however, focused primarily on Section 104(a) of the Act which pertains to ultimate *public* access under regulations to be issued by the Administrator. Thus, we turn now to the "public access" provision which is, we believe, plainly unconstitutional.

The most glaring omission from Section 104(a) and the seven "factors" enumerated in that provision is Congress' total failure to recognize and direct the Administrator to implement the strong public interest in presidential confidentiality which this Court unanimously approved, and to which it granted constitutional stature in *United States* v. *Nixon*. Section 104(a)(3) speaks of "the need to prevent general access . . . to information relating to the Nation's security," but it does not direct the Administrator to take account of the need to protect "candid, objective and even blunt or harsh opinions in Presidential decisionmaking" by according confidentiality to "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." 418 U.S. at 708, 705. The "needs" of full disclosure of the "Watergate affair" and of historians' access to materials of "general historical significance" are affirmatively specified as desirable legislative objectives, but there is no countervailing "need" expressed by Congress to protect the confidences of presidential advisers or the details of the "internal operations" of the Presidency.

There are other omissions from Section 104(a) which the court below tried to cure by engrafting judicially constructed rules onto the statute. Section 104(a) imposes no limitation whatever on the procedures used in *screening* the materials. The Administrator, as previously noted (pp. 35-36, *supra*), intends to transcribe *all* portions of the White House tape recordings and subject *all* documents to equally intensive screening by archivists. The district court *suggested* to the Administrator (J.S. App. 21a n.13) various ways by which interferences with privacy might be minimized at the

screening stages (J.S. App. 29a-30a), but none of these procedures is guaranteed or even impliedly encouraged by the Act.

7. *Procedural protections.*

The Act provides no procedural protection for the former President other than the right ultimately to go to court. Operating in a vacuum, the Administrator drafted regulations which would entitle Mr. Nixon to submit challenges to decisions to release material for public access, but, as the court below noted, the regulations failed to provide that the former President would be notified of archival decisions to open particular materials, and no procedure was fixed to enable him to examine the material in order to decide whether a challenge should be made. The district court observed that without such a procedure, "either Mr. Nixon must have perfect recall of the materials, which is difficult to expect, or the risk must be run that he would be unable to assert his privacy rights before public access, in his view, had already violated them" (J.S. App. 30a-31a n.23). Accordingly, the district court *suggested* that "a workable arrangement . . . be devised" to grant Mr. Nixon these procedural rights.

The most troubling aspect of the absence in Section 104(a) of any reference to presidential confidentiality and to any procedures designed to secure that confidentiality is that these omissions operate to reverse the legal presumption of confidentiality. In *United States* v. *Nixon,* this Court said that there was a "presumptive privilege" covering presidential deliberations with the Chief Executive's advisers. Section 104(a) makes such conversations presumptively public, leaving former President Nixon the burden of persuading the Administrator, or ultimately a court, that a particular conversation should be shielded by the privilege. How likely is it that the constitutional confidentiality of presidential communications will be properly preserved if the former President has the burden of invoking and proving the privilege as to each of the thousands of otherwise privileged communications? The machinery contemplated by Congress and implemented by the Administrator make vindication of the right impossible.

C. The Immediacy of the Act's Impact

The district court prefaced its discussion of the constitutional issues with the explanation that it was treating only a "narrow" challenge—*i.e.,* whether the "regulatory scheme enacted by Congress [is] unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)" (J.S. App. 18a-19a). The court believed that Mr. Nixon's "objections to public access" might be eliminated by regulations which the Administrator could promulgate, such as "restrictions on access by the public, or by anyone other than executive officials for particular purposes, for a fixed period of years, or until the death of Mr. Nixon and others participating in or the subject of communications" (J.S. App. 27a). It also thought that infringements on appellant's First and Fourth Amendment rights might be obviated by regulations "[p]roviding for the return to Mr. Nixon, pursuant to subsections 104(a)(5) and (7), of materials implicating his personal or political privacy rights" (J.S. App. 27a-28a). Hypothesizing such regulations, the district court concluded that "[w]hat remains before us, then, is the question whether the process by

which the materials will be reviewed and classified, leading to the imposition on various classes of them of whatever access restrictions are included in the regulations, is constitutional" (J.S. App. 28a).

The court below erred in concluding that the process of review and classification prior to opening the materials to public access is all that this case, at its present juncture, involves. As we have demonstrated above, sections of the Act that were substantially ignored by the district court have an immediate effect—all the materials are immediately sequestered, Mr. Nixon's access to them is burdened both by their physical removal and by individualized pre-access paperwork requirements, executive officials in future administrations are granted ready access to them, the burden of claiming and proving presidential privilege is shifted to the former President, access to private parties by subpoena is facilitated, and the Administrator is not obliged by any statutory directive whatever to take account of the policy of confidentiality in determining how to treat the materials while he is reviewing them or in drafting and issuing his "public access" regulations.

These immediate and direct consequences, separate and apart from the exhaustive review and screening process contemplated by the Act, violate the constitutional limitations growing out of the separation of powers principle, the Bill of Attainder Clause, and the First and Fourth Amendments. It blinks reality to say that Mr. Nixon and future Presidents will not have been harmed by the enactment of this legislation—except for the screening done by archivists—if the Administrator adopts regulations of the kind the district court imagined. Even if the Administrator were

to embargo *all* public access to materials of the Nixon Presidency until the former President's death and until the death of anyone involved in any way in any presidential communication and were to direct the prompt return to Mr. Nixon of all copies or portions of tapes and memoranda which, from a cursory examination, involve his First and Fourth Admendment rights, the various consequences enumerated above would still have taken effect. Is it constitutionally permissible for Congress to deprive a former President, against his will, of *all* papers and effects of his administration—even if public access to such items is then barred until his death? Is it constitutionally permissible to make such items available, against a President's will, to executive officials in future administrations? Is it constitutionally permissible to require a former President to shoulder the burden of establishing, at his own personal expense in multiple litigation throughout the country, that any presidential document which a private litigant wishes to reach by subpoena is subject to the constitutional rule of confidentiality established in *United States* v. *Nixon*? May Congress decide, as it has in this statute, that "the needs of historians, political scientists, and other scholars" to examine "the events of recent years and the workings of our government" override the "presumptive privilege for Presidential communications" which is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution?" [15]

In *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972), this Court distinguished between situations in which plain-

[15] The contrasting quotations are from H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. 3 (1974), and from *United States* v. *Nixon*, 418 U.S. 683, 708 (1974).

tiffs assert claims based upon "speculative apprehensiveness" that some official action might be taken in the future and those where plaintiffs' allegations relate to "specific present objective harm or a threat of specific future harm." The Court reaffirmed the principle of *Ex parte Levitt,* 302 U.S. 633, 634 (1937), that one challenging legislative action "must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action. . . ." Mr. Nixon is obviously in that position with regard to many aspects of the Act other than the reviewing and screening that the law contemplates and that the district court considered to the exclusion of other consequences.

The legislative commands included in the Act have certain inevitable consequences which make these constitutional issues more analogous to those presented in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) and in *Buckley* v. *Valeo,* 424 U.S. 1 (1976), than to *Watson* v. *Buck,* 313 U.S. 387 (1941), and *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1 (1961), on which the district court relied (J. S. App. 21a-22a). *Watson* v. *Buck* presented the question whether a federal court should enjoin, *in toto,* two Florida criminal statutes containing 42 separate sections, in apparent disregard of the state legislature's explicit severability clause. 313 U.S. at 395-96. The language quoted by the court below related to the possibility that several of the statutory provisions not explicitly considered might be constitutional on their face or as applied. Quite plainly, such a possibility is not at all similar to the remote prospect hypothesized here by the district court—*i.e.,* that the Administrator's regulations might retreat so substantially from what

the legislation anticipates that the constitutional claim might be weakened. Similarly, in the *Communist Party* case, this Court refused to decide whether the *statutory* sections of the Subversive Activities Control Act of 1950 which imposed disabilities on members of Communist-action organizations were constitutional in advance of any actual implementation of those statutory provisions. 367 U.S. at 77-79. It was not suggested in the *Communist Party* case, however, that a decision would be unripe simply because an administrative agency had not yet promulgated regulations, and that the regulations might conceivably alter the statute so substantially that its enforcement would no longer harm the plaintiffs.

In the *Regional Rail Reorganizatior Act Cases,* 419 U.S. 102, 142-144 (1974), this Court rejected the argument that a constitutional challenge to a statute is rendered premature by the fact that some arm of government has not yet taken the final step that deprives the plaintiff of his asserted constitutional right. After noting that "the exact terms of the conveyance" challenged by the plaintiffs "remain to be decided," but that "an order of the Special Court directing the conveyance is virtually a certainty," the Court said (419 U.S. at 143):

> Thus, occurrence of the conveyance allegedly violative of Fifth Amendment rights is in no way hypothetical or speculative. Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. [Citations omitted.] "One does not have to await the consummation of threatened

injury to obtain preventive relief. If the injury is certainly impending that is enough."

The route taken by the court below is similar to that chosen by the Court of Appeals for the District of Columbia Circuit in *Buckley* v. *Valeo,* 519 F.2d 821 (1975), which was rejected when the case arrived here. The court had held, for example, that the constitutionality of the authority to be exercised by the proposed Federal Election Commission was not ripe for adjudication because the Commission had, *inter alia*, "enacted no rules" and had not instituted any proceedings or disqualified any candidate. 519 F.2d at 893. This Court decided that since rules and regulations had been issued by the time the case was decided here and since the Commission's other functions, while "yet unexercised," appeared to be "all but certain," a judicial decision was not premature. 424 U.S. at 115-17.

Under the rules of these cases, the various constitutional challenges we raise are fully ripe for decision on several grounds:

First, the challenges to the immediate consequences of the Act which we have previously described—those unrelated to "public access"—are not contingent in any way on future action or inaction by a federal agency. Hence they are ripe for decision under any conceivable test.

Second, even with respect to the "public access" provision of the Act, the two reports issued to date by the Administrator, together with his proposed regulations, demonstrate that it is "virtually a certainty" that the extraordinarily protective regulations conceived of by the court below are remote from the Administrator's mind. There is absolutely no suggestion

in the proposed regulations that there would be any time restriction on public access to confidential communications for the life of Mr. Nixon or anyone participating in or the subject of such communications (J. S. App. 26a-27a). And the detailed report on anticipated procedures—a matter which is not subject to congressional veto as are the regulations under Section 104—indicates, as we have previously noted, that there will be no actual "return to Mr. Nixon . . . of materials implicating his personal or political privacy rights" (*id.* at 27a-28a). Instead, he will be given a *copy* of tape recordings on which his most personal conversations appear, after they have been meticulously transcribed. The original tapes, along with several other copies, will be kept by the Administrator.

Third, the unconstitutional impact of a statute such as the one challenged here grows, in part, out of its "chilling" or "in terrorem" effect. For reasons discussed more fully below, the possibility that Congress could constitutionally enact another law such as this will inhibit future occupants of the presidential office and their close advisers. The constitutional question is, therefore, broader than simply whether Richard Nixon has been deprived of constitutional rights by a particular law implemented by particular regulations administered in a particular way. An equally important question is whether a law of this kind, vesting such authority in the Administrator, who is an appointee of the executive branch, so affects the Presidency that the Act should be invalidated on its face. When dealing with incursions by one branch of government into the authority of another, the courts should be guided by the principles analogous to those applied in cases involving free expression. In

this area, as with the First Amendment, litigants must be "permitted to challenge a statute not because their own rights . . . are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected [conduct]." *Broadrick* v. *Oklahoma,* 413 U.S. 601, 612 (1973). A law that overbroadly restricts liberties secured by the First Amendment cannot be saved merely by a provision enabling the agency administering it to cut back on the broad inhibitory effect of the express terms of the statute. *See, e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 515-17 (1964). The likelihood that a President will alter the best way of doing business because he fears that Congress may enact a law in the future which will accord broad sequestration authority to an executive branch official is as harmful to the national interest as is the "chilling" effect on expression caused by an overbroad restraint on free speech.

Beyond the arguments made above, however, lies a practical consideration that demonstrates how unworkable is the approach taken by the district court. The court below leaves for later litigation a host of legal and constitutional challenges to various phases of the Administrator's implementation of this statute. If the opinion is carefully analyzed, the "reserved" questions expressly anticipated within its four corners come to a total of at least a dozen; and not all can be resolved at the same time.[16] Some involve administrative steps which will be taken before or after regulations under Section 104 are promulgated; others involve the language of the regulations; yet others concern the interpretation actually given to regulations.

[16] *E.g.*, J.S. App. 21a n.13, 26a n.18, 28a, 29a n.21, 30a n.23, 83a n.59, 84a n.60, 85a-86a, 87a, 89a n.64.

The upshot of leaving such questions unresolved is that Mr. Nixon is destined, under the district court's procedure, to a lifetime of litigation, at his personal expense, over the interstices of this hastily drafted piece of legislation. If the district court is correct in its conclusion that in advance of the Administrator's promulgation of regulations and actual administration of the law, all these legal issues are premature, the Act casts an excessive burden on the one individual who is subject to it—former President Nixon.

To be sure, there are regulatory statutes which assign great authority to administrative agencies or executive departments to implement broad statutory guidelines with specific regulations and policies. But in those situations the statutes apply to a large number of individuals or entities, and the burden of case-by-case litigation is divided among the entire group which is subject to the law. This statute deals with one individual—Richard Nixon. Whatever questions will be brought to court for judicial review as the Act is enforced will be brought by Mr. Nixon, and the burden of continuous litigation of this kind imposed on a former President is an additional inhibition on the free exchange of ideas among future Presidents and their advisers.

In concluding this discussion, we note that this fragmented piecemeal litigating approach which the district court suggested (and which the appellees have urged in their Motions To Affirm) is contrary to the position taken by some of the intervenor appellees when they submitted comments to Congress on the Admin-

istrator's proposed regulations. At that time, they advised Congress (emphasis added):[17]

> Mr. Nixon's constitutional claims are presently pending for decision in the courts .... The courts, rather than [the Administrator], should decide the questions of constitutional privilege. *The regulations need not, and should not, provide a mechanism for Mr. Nixon to assert these same arguments again after the legal challenges have been resolved in the courts.*

I

THE ACT VIOLATES THE SEPARATION OF POWERS PRINCIPLE BECAUSE IT ENCROACHES ON PRESIDENTIAL AUTHORITY TO CONTROL INTERNAL OPERATIONS OF THE PRESIDENTIAL OFFICE AND BREACHES PRESIDENTIAL CONFIDENTIALITY

The opening words of Article II of the Constitution declare: "The executive power shall be vested in a President of the United States of America." We submit, for reasons elaborated below, that the Act infringes upon presidential "executive power" because it removes from the former President, by legislative command, *all* discretionary authority over *all* material generated during the period of time that he occupied the Office of Chief Executive. Given the complexity in our day and age of managing that office, and given the President's obvious need for written or other memorialized forms of communication between himself and those who advise him, the authority exercised here

[17] Comments of the American Historical Association, The American Political Science Association, and The Reporters Committee for Freedom of the Press on the proposed regulations to implement P.L. 93-526 submitted to the Senate Committee on Government Operations and the House Subcommittee on Printing (pp. 8-9).

by Congress—to seize and subject to external scrutiny, even by individuals whom some describe as "trained and discreet," every piece of paper, every dictabelt and every reel of tape produced over the 5½ years of appellant's Presidency—constitutes an extraordinary invasion of the authority that has customarily accompanied the holding of that office or any other, be it public or private.

We need hardly emphasize to this Court how dependent contemporary society has become on the written or otherwise memorialized word.[18] The record in this case demonstrates the geometric progression of the volume of presidential papers from the time of Herbert Hoover to the present. The increasing complexity of the issues facing the President requires the preparation of written views and memoranda addressed to such issues. These memoranda deal, *inter alia,* with various approaches to problems which the President considers, the political implications of various resolutions of these issues, and the differing solutions offered by different members of the White House staff. The result is an amalgam of White House documents which outline and treat the issues confronted daily by the President.

The manner by which these issues are considered, weighed, resolved and acted upon is solely the responsibility of the President. He alone has the authority to direct the staff and determine how the critical issues of the day, domestic and foreign, will be handled by his

[18] We say "otherwise memorialized" to describe not merely the tape recordings which are involved in this particular case, but to include, as well, other conceivable forms of recordation that modern technology may devise.

office. The deliberations and decisions of that office are matters which the Constitution vests solely in the President. These are matters subject to control or restriction by neither of the other two branches. Absent the overriding but specific demands of law enforcement subpoenas, the courts and the Congress have no power to interfere with the internal conduct of the President's office.

Accordingly, the documents and deliberations (whether oral or written) of the presidential office are properly the concern of the President himself, and no one else. The process may neither be regulated nor intruded upon by the legislative or judicial branches. This process is the essence of the Presidency because it comprises the method by which presidential decisions are reached.

We submit that the separation of powers principle prohibits the blanket seizure accomplished here by Congress because it subjects the inner operations of the presidential office—in all its manifold details and with its necessarily uninhibited and confidential exchange of myriad views—to the microscopic scrutiny of future executive branch employees and, at the discretion of certain government officials, to the public spotlight. The constitutional draftsmen did not contemplate that presidential decisionmaking would occur in a goldfish bowl. It is each President's prerogative to decide whether his administration will throw all executive deliberation open in this manner. To do so, of course, would impair the free flow of communication among presidential aides and the President and would no doubt have its most serious impact in those particular areas where candid communication is most vital. In-

deed, Congress was aware, we believe, that if a procedure of this kind were directed to all Members of Congress, so as to seize and subject to an outsider's review all documents "having historical or commemorative value" upon a Congressman's departure from office, the practice would impair the legislative process. And we need hardly add that it would be destructive of this Court's procedures and established traditions if all the papers of any Justice upon leaving the Court were similarly reviewed by an outsider and then made public.

We begin our discussion of the separation of powers issue by analyzing why the constitutional principle shields the internal operations of a President's office from congressional action that could directly or indirectly impede the President's fulfillment of his Article II responsibilities. We then note this Court's recent approval of the general principle that deliberation in presidential decisionmaking deserves and constitutionally requires confidentiality. And we respond to the argument—made by the court below and by the intervenors, but now disclaimed by the Solicitor General—that if a *former* President seeks to preserve the confidentiality of his deliberations, his claim, as contrasted with an incumbent's, is entitled to little or no judicial recognition. Finally, we turn to a discussion of the tradition that has been followed by every President since the founding of this Nation, that has been sanctioned by both the Judiciary and Congress, and that underscores the separation of powers principle this Act infringes.

A. Legislative Restriction Of A Former President's Authority To Control And Dispose Of His Papers Encroaches Impermissibly Upon The Executive In Violation Of The Separation Of Powers Principle.

The essence of the separation of powers doctrine is that in this government of three equal branches, one branch, ". . . unless otherwise expressly provided or incidental to the powers [constitutionally] conferred," may not impinge upon the ability of another to carry out its constitutionally imposed responsibilities. *Springer* v. *Government of the Philippine Islands,* 277 U.S. 189, 201 (1928). This Court has expressed that constitutional tenet in various contexts. In *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), the Court pointed out that "the acts of each [branch] shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments." 289 U.S. at 530. And in *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), the Court observed that "[t]he sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there." 295 U.S. at 630.

Our espousal below of this Court's repeated admonitions that one branch may not intrude upon the ability of another to carry out its assigned functions was mistakenly characterized by the district court as an "archaic view of the separation of powers as requiring three airtight departments of government" (J.S. App. 34a). We most definitely do not argue here—and did not argue below—that the three branches of government must exist in "airtight" compartments that have no relation with one another. The Founders of this Nation had no such view of the separation of powers, as

No. 47 and No. 48 of the Federalist Papers plainly demonstrate. It was their intention, rather, to keep legislative, executive and judicial powers sufficiently independent "that none of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers." The Federalist No. 48, at 321 (Mod. Lib. ed. 1937) (J. Madison). And it is instructive that James Madison, in assessing the potential for abuse of the separation principle, observed in the same paper (*Id.* at 323):

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greatest facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.[19]

Unquestionably, there are areas in which the powers of the respective branches necessarily overlap. But there is within the sole domain of each branch those particular powers and prerogatives that are essential to the performance of its mandated functions. The most important is the right to deliberate, consider, and reach decisions in the manner that each branch individually

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[19] *See also* The Federalists No. 51, *supra* at 338 (A. Hamilton or J. Madison):

> In republican government the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislative into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided.

chooses. Conference memoranda of the Supreme Court drafts of congressional reports, and policy formulation briefs for the President all share the same character. Each is an intrinsic part of the internal management of the particular branch and relates to how its constitutional function is carried out. The head or heads of each department must be able to make individual choices on how to manage effectively the affairs of that office and to carry out the obligations assigned by the Constitution.

In the present Act, Congress has asserted the power to take from a particular Chief Executive the ultimate control over the materials of his office, thereby interfering with the President's management choice. It has legislatively mandated the terms under which presidential materials will be housed, reviewed, and potentially made public.

The influence upon the operations of the Presidency, both direct and indirect, that Congress could wield through the use or abuse of such power can be illustrated in several ways. One of the paramount duties of the President is to sign or veto bills passed by Congress. Given the number of bills enacted each year and the myriad subjects they encompass, the President must rely upon the assistance of others in deciding what action to take. This advice may be, and often is, gleaned from his staff, members of his Cabinet, Members of Congress, or even private citizens. And the substance of the information conveyed may reflect as many viewpoints as the number of persons whose counsel the President seeks. The President may be told that a particular bill is inflationary; that it reflects unsound economic policy; that it is the political pork barrel for a powerful Congressman; or that a veto will alienate

many of the President's political supporters. Some of this advice is received in confidence; some may be offered publicly.

In reaching his decision, it is the President who will determine from whom he will seek advice, what advice is relevant, what weight it should be accorded, and ultimately whether to sign or veto the bill. If the President vetoes the bill, he returns it to Congress. If Congress is dissatisfied, its recourse is to override the veto. It has no power to require the President to justify or further explain his action. That being the case, Congress cannot attempt to confiscate or make public the decisional memoranda or the private conversations underlying the President's decision to veto congressional action. Nor, as was apparently the district court's view, can Congress circumvent the separation of powers prohibition by legislatively directing a subordinate officer of the President to seize such material from the President and then decide, according to congressionally-imposed criteria, whether it should be made public. It is no more within Congress' power to have such work product made available to it or to the public than it is the President's right to have access to the memoranda prepared by the staff of the Member of Congress who introduced the bill originally, or the internal records of the committee that recommended the bill's passage to the full congressional body. Such communications are an integral and vital part of the functioning of the respective constitutional offices. If their sanctity can be breached by a coequal branch of our government in the broad-scale fashion reflected by the Act, then the content of that work product will reflect and be influenced by that fact.

Another responsibility and prerogative of the President is that of executive appointments and nominations for the Judiciary and administrative agencies. For the President to make a reasoned choice, he must have available candid, thorough, and critical evaluations of the abilities of each candidate.

The factors that go into the decisionmaking process for presidential appointments are inherently discretionary with the President. Indeed, the appointment process is the epitome of the President's political decisionmaking authority. *Washington* v. *Clark,* 84 F. Supp. 964, 966 (D.D.C. 1949), *aff'd* 182 F.2d 375 (1950), *aff'd* 341 U.S. 923 (1951). Neither of the other two governmental branches may interject itself into that process in such a way as to impede or influence the President's exercise of his discretion. This was recognized very early by the Supreme Court in Marbury's suit against Secretary of State Madison. *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803). There the Court noted (5 U.S. (1 Cranch) at 165-166):

> To aid [the President] in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.
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> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.

When Madison was President, the Senate attempted to meet with him to discuss his nomination of an ambassador to Sweden. The President refused to have such a meeting, and in a letter dated July 6, 1813, he advised

the Senate that he deemed it his "duty to decline the proposed conference with the committee" on constitutional grounds. He based his refusal on the constitutional principle of separation of powers, stating his view (8 The Writings of James Madison, 250-51 (Hunt ed.))

> . . . that the Executive and Senate, in the cases of appointments to office and of treaties, are to be considered as independent of and co-ordinate with each other. If they agree, the appointments or treaties are made; if the Senate disagrees, they fail. If the Senate wish information previous to their final decision, the practice, keeping in view the constitutional relations of the Senate and the Executive, has been either to request the Executive to furnish it or to refer the subject to a committee of their body to communicate, either formally or informally, with the head of the proper department. The appointment of a committee of the Senate to confer immediately with the Executive himself appears to lose sight of the coordinate relation between the Executive and the Senate which the Constitution has established, and which ought therefore to be maintained.[20]

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[20] President Tyler took a similar view of Congress' right to learn about the Executive's internal consideration of appointments. In declining a request from the House of Representatives for information as to which members of the Twenty-sixth and Twenty-seventh Congresses had applied for offices, President Tyler stated:

> All appointments to office made by a President become, from the date of their nomination to the Senate, official acts which are matters of record and are at the proper time made known to the House of Representatives and to the country. But applications for office, or letters respecting appointments, or conversations had with individuals on such subjects are not official proceedings and are therefore beyond the right of the House of Representatives to hear and its duty to know.

J. Finley & J. Sanderson, The American Executive and Executive Methods, 219 (1908).

The rationale underlying a refusal by the President to discuss his proposed nomination with a Senate committee applies equally to the kind of disclosure forced by this Act. The Congress is not entitled, as part of its constitutional power, to inquire into the thought-processes that culminate in a presidential decision; a compulsory meeting between the President and a group of Senators would have precisely that effect. Similarly, if Congress were given access to a President's memoranda and papers, it would know *why* and *how* he has reached a particular executive decision. Those questions are of great political interest to Congress, but they do not fall legitimately within Congress' assigned constitutional role.

In *Myers* v. *United States,* 272 U.S. 52 (1926), this Court discussed various of the President's powers which were held to be exclusively within the competence of the Chief Executive. The same constitutional principles that led the Court to the conclusion it reached in *Myers* apply here (272 U.S. at 163-164):

> Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; . . . and, finally, that to hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.

The "executive power of the government . . . the general administrative control of those executing the laws" to which the Court referred in the *Myers* case must necessarily include the authority to control deliberations and access to information and to decide the form that the deliberative process will take—in short, to determine how decisions will be made and communicated. It also includes the right to determine who will be privy to the internal operations of the Presidency, and when and to whom its confidences and mode of desionmaking will be disclosed. Just as there is no need to have a specific clause in the Constitution that reserves to the President the exclusive power to appoint and remove his executive branch subordinates, there need be no specific reference to executive control over its deliberative process or the confidentiality of presidential documents to give a President sole authority over their control or disposition.[21]

This Court faced a parallel issue in *Powell* v. *McCormack,* 395 U.S. 486 (1969), where it was argued that the separation of powers doctrine (as well as the Speech and Debate Clause) barred judicial consideration of the House of Representatives' refusal to seat Congressman Powell. The Court recognized that, in the absence of constitutional claims, the "respect due a coordinate branch of government" would have required the judiciary to leave the question of House membership to the Congress itself. Since, however, the

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[21] The distinguished dissenters in *Myers* (Justices Brandeis and Holmes) would have sustained the statutory limitation on the presidential removal power because Congress is given constitutional authority to establish the executive offices at issue. That reasoning would not apply, however, to the subject of internal presidential materials, which do not require legislative authorization and are not subject to any legislative direction or control.

Congress had violated a constitutional limitation with respect to Congressman Powell by imposing a qualification on him in addition to those specified in Article I, Section 5 of the Constitution, judicial relief was appropriate. 395 U.S. at 548-550. The same principle that prohibits this Court from intruding into an internal organizational question relating to the House of Representatives forbids the Congress from interfering in details of the administration of the presidential office.

The historical circumstances of the legislation at issue here are strikingly similar to the circumstances under which the statute invalidated in *Myers* was enacted. Chief Justice Taft noted in *Myers* that the statute, the 1867 Tenure of Office Act, had been enacted because of "the serious political difference between the two houses of Congress and President Johnson." 272 U.S. at 164-165. He characterized the Act, which restricted the President's power to remove executive branch officers, as one which "exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm, and destroy the principle of executive responsibility, and separation of the powers fought for by the framers of our government. . . ." 272 U.S. at 167. He also repeated (*id.*) the observation of then Congressman James G. Blaine, which had been previously quoted in *Parsons* v. *United States,* 167 U.S. 324, 340 (1897):

> It was an extreme proposition—a new departure from the long-established usage of the federal government—and for that reason, and for no other, personally degrading to the incumbent of the presidential chair. It could only have grown out of abnormal excitement created by dissensions between the two great departments of the government. . . . The measure was resorted to as one of self-defense against the alleged aggressions and unrestrained power of the Executive Department.

The 1974 Act is similarly the product of "abnormal excitement."[22] The Court recognized that this "extreme" 1867 law would impair the Presidency if it were enforced. This Court, too, should appraise the 1974 law not by the passions of this period but by the long-term effects of the statute upon a President's ability to be master in his own house. The usurpation by Congress of the authority to control the operation of the President's office with respect to the handling of executive deliberations and the work product thereof is as potentially paralyzing to the President's ability to carry out his constitutional duties as the assault evidenced by the Tenure of Office Act invalidated by the Court in *Myers.* Indeed, if Congress has the power to force publication of the President's decisionmaking process concerning appointments, or even to reveal, after a President leaves office, the names of all persons he ever considered for judicial or executive appointment, it will inevitably impair the appointment process. Congress' influence on that process, albeit indirect, is as abhorrent to the separation of powers as the invalid Tenure of Office Act.

The conduct of foreign affairs, like appointment of executive officers and signing of legislation, is another responsibility entrusted under the Constitution to the

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[22] A comparison of the bill of attainder aspects of this law to those of the 1867 Tenure of Office Act demonstrate how much more "degrading" this law is. If, for example, the 1867 statute had been limited specifically to attempted removals by "President Andrew M. Johnson" as this law is limited to "former President Richard M. Nixon," could there have been any real doubt as to its unconstitutionality?

President. It is certainly open to question, for example, what impact this Act may have with respect to foreign leaders who conferred privately with President Nixon if their conversations are to be generally available within the executive branch and perhaps opened to the public. The uncertainty introduced by permitting Congress to set the terms by which presidential files will be handled can seriously impair the willingness of foreign statesmen to communicate freely with the President. The President must be in the position to assure them that he will protect their confidences.

So that our position is not misinterpreted, we emphasize that we do not contend that the Act—even if applied to all Presidents—would bring the Presidency to its knees. Certainly that would not have been the effect of the Tenure of Office Act either. But total frustration of a coordinate branch's functions is not the test by which to judge whether the separation of powers has been breached. The standard is whether that branch's legitimate sphere of operations has been trenched on in a way impairing its operations. The fact that a President and his staff can adjust their practices by not memorializing their deliberations or actions in order to circumvent such an act's impact or by destroying memoranda while the President is still in office cannot salvage the Act. The point is that a President and his aides may deem it preferable to record such information (as did Presidents Kennedy, Johnson and Nixon), in order to preserve it, but may feel constrained not to do so because of this Act. That is the vice of such legislation. That the encroachment by Congress upon the Presidency is indirect is beside the point. As this Court reflected in *Kilbourn* v. *Thompson,* 103 U.S. 168, 192 (1881):

> By reason, also, of [the Congress'] popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people, the great source of all power in this country, encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power in any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separate from and independent of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

The full import of all we have said and the crux of the separation of powers violation we have raised is best summarized in the court of appeals' opinion in *Nixon* v. *Sirica,* 487 F.2d 700, 715 (D.C. Cir. 1974):

> We acknowledge that wholesale public access to Executive deliberations and documents would cripple the Executive as a co-equal branch.

That is precisely what this statute entails—and what the separation of powers does not permit.

B. The Act Violates The Constitutional Privilege Recognized By This Court in *United States* v. *Nixon* To Protect Presidential Confidentiality.

We have discussed above our contention that the Act violates the separation of powers principle because of its impact *generally* on the internal operations of the President's office. In its broad sweep, the Act also confiscates confidential materials that this Court has already determined are presumptively privileged, an ef-

fect that constitutes an additional infirmity. In *United States* v. *Nixon,* 418 U.S. 683 (1974)—a decision rendered less than six months before this bill became law—this Court commented on the "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" (418 U.S. at 705 (1974)):

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

[*Id.*] This Court went on to recognize that the "confidentiality of Presidential communications in the exercise of Art. II powers . . . derive[s] from the supremacy of each branch within its own assigned area of constitutional duties" (*id.*). In this regard, said the Court, a claim of presidential confidentiality has "constitutional underpinnings." The Court amplified this constitutional principle by ruling that there is "a presumptive privilege for Presidential communications" that is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708. In the context of *United States* v. *Nixon,* however, this Court concluded that the then-President's position, based on "a President's generalized interest in confidentiality" (418 U.S. at 711), had been rebutted by a uniquely powerful showing that the production of sixty-four specifically designated conversations was essential to "the fair administration of criminal justice." 418 U.S. at 713.

The President's "broad, undifferentiated claim of public interest in . . . confidentiality" (418 U.S. at 706) yielded to the compelling need for "evidence that is demonstrably relevant in a criminal trial" and which had been "preliminarily shown to have some bearing on the pending criminal cases." 418 U.S. at 712-13.

The present case is the reverse of *United States* v. *Nixon.* Here it is Congress that has asserted a "broad, undifferentiated claim of public interest" that seeks to sweep up *all* presidential papers, without discriminating between those specific items in which there is some overriding legitimate interest in disclosure—such as was shown in *United States* v. *Nixon*—and those to which the "presumptive privilege" most forcefully applies. By this enactment, Congress has withdrawn from the former President the authority to determine which, if any, of the materials of his office should be available to other executive departments in the current administration or possibly available to the public and which, if any, of his conversations with presidential advisers should be similarly accessible. In short, the Act reverses the presumptive privilege of confidentiality recognized in *United States* v. *Nixon* and places in a subordinate executive officer of successor administrations the power to intrude upon the confidentiality of a President's deliberations.

The district court justified the Act's impact upon the presidential privilege by three holdings, none of which finds support either in law or policy. *First,* it accorded "much less weight" to any assertion of the confidentiality privilege by a President in his materials the day he leaves office (J.S. App. 40a). *Second,* it held that the confidentiality privilege applies only to "communications" which "originate in confidence" pertain-

ing to "the discharge of presidential duties" (J.S. App. 41a). *Third,* having significantly narrowed the protective umbrella of confidentiality and accorded it lesser weight, the district court held that "[t]he intrusion on executive confidentiality that review by government archivists would constitute is, in our view, at most minimal" (J.S. App. 42a).

We respond to the district court's "much less weight" distinction between confidentiality claims of former and incumbent Presidents in the following next major section of this brief (pp. 81-90, *infra*). The second and third assertions are those to which we now turn. We believe that the court erred in its limited definition of the privilege, and we submit that the intrusion on executive confidentiality is particularly great because the Act reverses the presumption of privilege.

1. *The Scope of the Privilege*

An essential element of the district court's conclusion that the Act constitutes a minimal intrusion on presidential confidentiality was an interpretation of *United States* v. *Nixon* that does not square with either the language of this Court's opinion or the purposes the privilege is intended to serve. The district court read *United States* v. *Nixon* as limited to "communications" which "originate in a confidence," and which pertain to the "discharge of presidential duties" (J.S. App. 40a-41a). Indeed, the court even questioned whether such confidential communications are protected unless received directly by the President (J.S. App. 40a-41a n. 29). Such a limited definition excludes, *inter alia,* notes or memoranda made by the President for his own use, dictated recollections and observations,

and early drafts of speeches that he personally wrote. It excludes, as well, memoranda written by others without explicit assurances of confidentiality, documents that relate to political matters, and a host of papers that were not written for the President's own eyes but which formed the basis for recommendations or proposals refined or distilled by those who had direct access to the President. Each of these categories is, we believe, fully covered by the policy of confidentiality described in *United States* v. *Nixon* and deserves constitutional protection under the separation of powers doctrine. An atmosphere of assured confidentiality within the inner workings of the President's office could not prevail if he and his staff continually had to assess whether particular documents or conversations fall within the narrow legal confines described by the court below and thus deserve protection from compelled disclosure. Moreover, exclusion of subordinates' work product from the scope of the privilege would undermine the free flow of advice and exchange of ideas that must be garnered from all levels of the President's staff in order for him to perform effectively.

The district court's restriction of the privilege to communications in connection with official duties also disregards this Court's own description of the scope of the privilege. In *United States* v. *Nixon* the Court stated that "the need for confidentiality even as to *idle conversations* with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment." 418 U.S. at 715 (emphasis added). It is this broad umbrella of protection that accords with the necessities of the situation within the President's office.

What is at issue in assessing the need for the presumptive privilege is the confidentiality of the Presidency's internal operations—a subject that must be committed to the judgment of the particular Chief Executive ultimately responsible for that Presidency. In *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), Chief Justice Burger in a concurring opinion defined the scope of protection that would have to be afforded if efforts were made to invade the secrecy of this Court's processes:

> With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality *of its internal operations* by whatever judicial measures may be required. [403 U.S. at 752 n. 3 (emphasis added).]

The court of appeals in *Nixon* v. *Sirica*, 487 F.2d 700, 715 (D.C. Cir. 1974), similarly recognized that not only "communications" made in confidence are entitled to confidentiality, but that "wholesale public access to Executive *deliberations and documents* would cripple the Executive as a co-equal branch" (emphasis added). And in *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 729-730 (D.C. Cir. 1974), the same court described the public interest as follows (emphasis added): "protection of *the presidential decision-making process* requires a promise that, as a general matter, its confidentiality would not be invaded . . ."

The district court, therefore, should have evaluated the Act not merely by whether it infringed on the confidentiality of "official" communications to a President from a presidential adviser, but by how it will affect the endless varieties of other materials generated by and around a working President. All such materials relate to the process contemplated by Article II of the Constitution, and Congress' interference with any substantial part of that process violates the privilege this Court has already sustained.

2. *The Act Intrudes Significantly Upon Presidential Confidentiality*

This Court could say with confidence in *United States* v. *Nixon* that presidential advisers would not "be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S. at 712. But the same prediction cannot sanguinely be made as to the consequences of the Act. Those who advised Richard Nixon while he was President doubtless assumed that oral advice they gave the President would be disclosed only at the instance of one of the parties to the conversation. Indeed, from the very beginning of Mr. Nixon's Presidency, he insisted that his advisers provide him their candid opinions and, in turn, assured them of his intention to keep them in confidence. As Mr. Nixon explained it (App. 531-32):

> [T]he most important prerequisite for good decision making is for a President to have before him all possible options, a wide range of options . . . [Arthur Burns] said in order to get that kind of advice, first . . . you must tell your Cabinet that, which I did at our first meeting. Second, you must

tell your staff that, which I did very early in our administration, telling them in effect that I was interested in their views, that I could not always assure them their views would be accepted but that I wanted them to present their views with all the bark off so that I could, in making up my own mind, have the full range of options in front of me.

I also did this in my relationships with people outside of government, they were quite aware of this, which had frankly been my practice long before I became President and one which I implemented in many instances quite successfully when I was President. People outside of government were willing to write in what they might consider to be unpopular views. . . . They did so . . . because individuals knew I could keep a confidence and, of course, I felt that they could as well.

In his affidavit he said (App. 172-173):

It was my practice to discuss with my aides, other officials of government, members of Congress, representatives of different organizations, and private citizens, their opinions on such matters as the preparation of legislation, the signing or vetoing of enrolled bills, and even the commencement, continuation or termination of military action . . . . I also found that such discussions permitted me to explore a complete range of thoughts, opinions and options. For example, I would be able to elicit from my aides, Cabinet members, Congressmen and Senators, and others their feelings concerning not only the wisdom of a particular course of action, but their blunt assessments of possible ramifications upon foreign or domestic policy, as well as potential political effects. I assumed that such opinions were given in confidence to assist me as President, and that they would not be publicly disclosed. Just as important, those who gave me their opinions must have so assumed. Otherwise,

their advice would have been less candid and less valuable, particularly if they thought that their advice would be rejected and they would be held accountable publicly for what later might appear to be erroneous or even stupid.

This position mirrored that expressed decades ago by President Eisenhower when information was sought relating to the Dixon-Yates controversy (*Public Papers of President Dwight D. Eisenhower 1955,* at p. 674 (1959) (emphasis added)):[23]

But when it comes to the conversations that take place between any responsible official and his advisers or exchange of little, mere slips of this or that, expressing personal opinions on the most confidential basis, those are not subject to investigation by anybody, *and if they are, will wreck the Government.* There is no business that could be run if there would be exposed every single thought that an adviser might have, because in the process of reaching an agreed position, there are many, many conflicting opinions to be brought together. *And if any commander is going to get the free, unprejudiced opinions of his subordinates, he had better protect what they have to say to him on a confidential basis.*

The reels of recorded presidential conversations that are part of the material sequestered by this Act obviously contain verbatim accounts of countless "free, unprejudiced opinions" solicited by then-President

[23] *See also* 100 Cong. Rec. 6621 (1954) where President Eisenhower instructed the Secretary of Defense to forbid disclosure of executive branch "conversations or communications, or any documents or reproductions concerning such advice" because in his view, "it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters . . . ."

Nixon on a premise of confidentiality. Other materials covered by the Act, such as memoranda, notes, correspondence and miscellaneous documents relate to matters of domestic and foreign policy, as well as political assessments of presidential actions. In each instance, the author of the memorandum or document assumed that what he was writing would be seen by the President and kept secret unless the President (or someone acting on his authority) instructed otherwise.

Obviously, presidential advisers were aware when they expressed their opinions to Mr. Nixon that *he* might ultimately choose to disclose them—or that *they* might ultimately incorporate their opinions in published works. To this extent they yielded to the President's judgment, as that of their superior, to select the proper time for disclosure to other agencies in the executive branch or to the public, and they reserved their own options to disclose at some future date. The court below, therefore, relied on facts that were beside the point when it observed that "[p]residents and advisors are likely to write memoirs or to engage in public reminiscences disclosing communications that were once confidential" or that every President since Herbert Hoover has deposited presidential papers in presidential libraries (J.S. App. 42a-43a). These events do not derogate from the fundamental claim of confidentiality. Except to the extent that a President chooses to permit disclosure, his conversations with an adviser are expected to be kept confidential.

Under the Act, however, conversations and documents reflecting the thoughts and recommendations of advisers—some of whom are currently active in the political arena and others who someday intend to enter it—are entrusted to the hands of successor executive

officials of differing political views, motivations and philosophies. No matter how "professional and discreet" the district court may have viewed the hundreds of young archivists who will pore over such material, the fact remains that all presidential advisers must now wonder which confidences entrusted to a President will be honored and which ones breached. It is inevitable that future intervention by a third party, be it an official of the executive branch in a succeeding administration (given access to such materials under Section 102(d) of the Act) or a "trained and discreet archivist," will affect the scope and substance of the advice given a President. Regardless of the public position on the volatile issues in this case that the executive branch may have taken in the Ford administration or that it may now take in the Carter administration, this Court should not ignore the obvious "chilling" effect that the possibility of future third-party disclosure may have on those who serve the President today.[24]

The intervenor appellees have sought to undercut the confidentiality privilege by arguing below that presidential confidentiality is unimportant or undesirable. Relying upon the opinions of two former White House staff members and three newspaper columnists (App. 296), the intervenors contend that breaches of confidentiality by staff members and even by Presidents, both during and after a President's term in office, are so pervasive that there is no real expectation of confi-

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[24] Moreover, the constitutional principle of presidential confidentiality should not be lost forever merely because one President or two may disagree with it and choose not to assert it in litigation. The privilege exists for the benefit of the Presidency—and through the Presidency, for the benefit of the Republic—so that it cannot be waived forever by one President's inaction.

dentiality.[25] While it is a fact that "leaks" emanate from the White House for a variety of purposes, the conclusion that no confidentiality exists and thus no privilege need be afforded the President's communications is erroneous. As a matter of practice, those who advise the President may well assume that partial disclosure of their discussions will be made if the President believes disclosure is justified. And there are no doubt occasions when unauthorized disclosures of confidential matters do occur. But such instances do not significantly erode the expectation of confidentiality that is important to the flow of communications. And such instances are different, both in extent and in kind, from the massive, compulsory disclosures sanctioned by this Act.

Common experience teaches that despite the occasional voluntary disclosure of confidential information, even members of the public who communicate with a President on an issue before him assume that he cannot ever be compelled to disclose those communications. The practicing attorney who corresponds with the President concerning his opinion of a judge in his circuit whom the President is considering for appointment to an appellate court must assume that his letter will not be spread on the public record or even made available to a future Attorney General. Only then will he voice his critical evaluation of that judge's past performance. If the evaluation may become public, he

[25] The weight to be accorded these views must be judged against those of every President, from both political parties, who has held the office in the past 47 years. Each, in depositing his presidential materials in his library, has expressed the need to protect the confidences reposed in him during his term in office, and thus has reserved the right to limit access to such material. (App. 69, 79, 86, 92, 99).

must assess the impact of such release upon his professional career and will undoubtedly couch his views accordingly.[26]

The industry spokesman who candidly advises the President in private concerning his political views on school desegregation or environmental issues also assumes that he will not be called to account publicly for his private views unless the President makes his advice public. Otherwise, he too will temper his discussion, and the President will be cut off from a source of valuable and vital advice.[27]

A final indication that the infringement on presidential confidentiality is substantial is the Act's re-

[26] The fact that disclosure is made during the screening and review process only to employees of the executive branch does not eliminate or even reduce the effect on presidential confidentiality. The President may often wish to keep advice he is given by an assistant from others in the executive branch; a presidential adviser ordinarily assumes that his recommendation is for the President's consideration and not, in the absence of the President's deliberate transmittal, for the consumption of the entire executive branch. Being "master in one's own house" involves deciding which of one's subordinates should have access to particular information. Moreover, we note that in *United States* v. *Nixon* itself, the official seeking the information was the Special Prosecutor—an executive branch employee.

[27] Even more crucial are the areas of foreign policy and national defense. Justices Stewart and White commented on the obvious need for total secrecy as to these subjects in *New York Times Co.* v. *United States*, 403 U.S. 713, 728 (1971):

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . [W]ithin our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

versal of the presumption under which presidential communications are privileged. The meaning of the "presumptive privilege" recognized by this Court in *United States* v. *Nixon* is that even a court may not assume the power to decide whether a presidential communication should be disclosed, absent a *prior* showing of a "demonstrated specific need for evidence in a pending criminal trial." The court of appeals, in a decision predating *United States* v. *Nixon,* recognized the same fundamental point. In *Senate Select Committee* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974), involving a congressional committee's attempt to force disclosure of far fewer presidential materials than those covered by this Act, the district judge had rejected Mr. Nixon's claim of privilege because, in his view, "the President's unwillingness to submit the tapes for the Court's *in camera ex parte* inspection or in any other fashion to particularize his claim of executive privilege precludes judicial recognition of that privilege on confidentiality grounds." 498 F.2d at 728-729. The court of appeals held this action erroneous because the committee had not shown the subpoenaed materials to be "demonstrably critical" to the proper discharge of its constitutional functions (498 F.2d at 731), and because such a showing was necessary *prior* to any assumption by the district court of the power to order production for even *in camera* inspection.

Under this Act, the review of some 900 complete recordings by at least three levels of government employees (not merely by an individual judge) takes place without any prior showing of compelling need for particular items. And once the subordinate executive officer decides what items will be made public or disclosed to other government officials, the burden is

upon the former President to come forward and establish affirmatively the validity of a privilege of confidentiality. This reversal of the burden, together with the inroads the Act makes upon the assurance of confidentiality in general, renders the Act unconstitutional.

C. The Presumptively Privileged Status Of Presidential Deliberations Should Be Recognized Whether Claimed By A President While Still In Office Or Thereafter.

The private appellees in this case have argued both below and in this Court that the privilege of presidential confidentiality may be invoked only by an incumbent President, whether the disclosure sought relates to his own internal papers and conversations or to those of predecessors. (*See, e.g.,* Reporters Committee et al., Motion to Affirm, p. 21 n. 17.) The government took a more limited position in the district court, arguing that there is a difference in degree between the confidentiality rights of the incumbent and those of an individual who has left office (Brief for United States and Administrator of General Services, pp. 72-74):

> While we agree that there would be grave constitutional problems should Congress attempt to provide for access to the contemporaneous documents of an incumbent president (see *Senate Select Committee on Presidential Campaign Activities* v. *Nixon,* 162 U.S. App. D.C. 183, 498 F.2d 725 (D.C. Cir., 1974)), in a constitutional sense the separation of powers doctrine operates in a different manner with respect to a former president. The presidency is, of course, a continuing institution, always occupied and functioning, always vested with the executive power under Article II of our Constitution. No one man is or can be the embodiment of that office. . . . A former presi-

> dent, of course, wields no Article II powers—he is a private citizen with no more and no less legal authority than any other private citizen. Without regard to questions as to whether a former president may claim presidential privilege to the documents of his administration, it is clear that the doctrine of separation of powers is fundamentally directed to the *contemporaneous* exercise of power by the coordinate branches of government . . . . In this context, Congress intended and the court must view the Act as preserving the materials of a former president rather than as an interference with the exercise of constitutional powers by an incumbent.

This position skirted that taken a few months earlier by the government—before passage of the Act it now defends—in litigation before the Court of Claims. There the government's position was unequivocal.

> [The government] has a strong institutional interest in the protection to be afforded Presidential materials once the President leaves office.
>
> *A former President may assert a privilege to protect the confidentiality of materials such as those at issue here . . . .*
>
> The rationale expressed in *United States* v. *Nixon* clearly is applicable after a change of administrations and in fact must be in order to be effective. Certainly a privilege which is "fundamental" to the operation of Government cannot disappear overnight. *The privilege and the right of the former President to assert it must continue. The frankness of communications protected by the privilege would be virtually useless if it disappeared as soon as a President* leaves office. (Footnotes omitted; emphasis added.)[28]

[28] "Statement of the United States Regarding the Assertion of Presidential Privilege for Documents of a Former President," filed in *Sun Oil Co.* v. *United States,* 514 F.2d 1020 (Ct.Cl. 1975).

The district court, without the benefit of the government's statement to the court in *Sun Oil,* concluded that the position taken by the private appellees—denying to a former President any right whatever to claim presidential confidentiality—"has much to commend it" (J.S. App. 37a). But the court found it unnecessary to go to that extreme. Evidently persuaded by the government's intermediate position, the court concluded (J.S. App. 40a):

> [E]ven assuming *arguendo* that Mr. Nixon may, as a former President, assert executive privilege, such a claim is not as forceful as one raised by an incumbent. All of the reasons militating against permitting a former President to assert privilege without the support of the incumbent suggest, at the least, that if he is to be allowed to do so, such a claim carries much less weight than a claim asserted by the incumbent himself.

The court below then said that because the former President's confidentiality assertion is, in this regard, "less forceful," and because it attaches, under the district court's erroneous view (see pp. 70-73, *supra*), only to communications sheathed in confidence and in the exercise of his official duties (J.S. App. 40a-41a), the intrusion of the Act on presidential confidentiality is "at most minimal" (*id.* at 42a).

Now that the case has reached this Court, the government has abandoned the position followed by the court below. In his Motion To Affirm, the Solicitor General states (Motion of the Federal Appellees To Affirm, pp. 18-19 n. 11):

> The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege in litigation against pri-

> vate parties. We do not share this doubt; we believe that a former President's materials concerning the communications, submissions and deliberations essential to the conduct of his office are presumptively privileged. The privilege attaches to the documents themselves. It is for the benefit of the republic, the President, and his advisers alike, and it does not dissipate upon a change of Presidents or even the death of an ex-President. The confidentiality necessary to ensure uninhibited discussion must be measured in decades. It cannot be limited to the term of office of a particular President. Such a privilege should be recognized by a court if asserted by a former President, and a court should recognize a privilege of this sort even if no individual asserts it.

This strong endorsement of the importance of presidential privilege—the recognition that it is "for the benefit of the republic," and not, as the government had previously suggested, simply a matter concerning the "materials" of a man who is like "any other private citizen"—undercuts a fundamental premise of the decision below. If the constitutional privilege applies and should be judicially recognized as to internal presidential "communications, submissions and deliberations" even if the former President fails to assert it —or even if he is dead—there is surely no basis for distinguishing, in a constitutional analysis, between the claim of an incumbent and the claim of a former officeholder. We urge this Court to adopt the government's present position for it properly accords a former President the standing to resist compelled disclosure of his personal deliberations.

The district court's conclusion that a former President has less of a claim than an incumbent to preserve

the confidences reposed in him while in office is, we submit, erroneous on its face, and grows out of confusion by the court of two different kinds of "executive privilege" which are based on substantially different policies.[29] The district court cited and discussed cases concerning a privilege based upon ongoing government operations—*i.e.*, a claim that disclosure of records maintained by the executive branch would result in direct contemporaneous harm to the national interest. *United States* v. *Reynolds,* 345 U.S. 1 (1953) is the leading authority in this area. It recognizes "the privilege which protects military and state secrets." 345 U.S. at 7. That privilege, as the Court observed in *Reynolds,* "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party." *Id.* The assertion of that privilege—described by the Court in *United States* v. *Nixon,* 418 U.S. 683, 706 (1974), as "a claim of need to protect military, diplomatic, or sensitive national security secrets"—is properly vested in the incumbent Chief Executive. That privilege in no way depends upon who authored the communication or to whom it was made; it exists to protect disclosure of *information,* and the decision as to whether disclosure of particular information—even information dating from a previous administration—would prejudice the Nation's interest at any particular time is one best made by the incumbent or his designee under law. No interest of the previous President is at stake in such a decision, unless

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[29] The district court refused to distinguish between "presidential privilege" and "executive privilege"—which it viewed as simply "semantic distinctions" (J. S. App. 35a-36a and n. 24). We believe that the two are founded on different policies justifying different results.

of course the documents also fall within the class of materials protected by presidential privilege.[30]

The presidential privilege that turns on the confidentiality of internal operations of a Presidency is entirely different.[31] The important factor there is not the impact of the information disclosed at any particular time, but the assurance to the President and his aides that their deliberations will not in the future be made public against the President's wishes. A successor has no appreciation for the assurances of confidentiality that a former officeholder imparted to those around him. The "valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties" (418 U.S. at 705) relates to *personal* relationships between a superior and those who work for him. It makes as much sense to have Mr. Nixon's successors in office decide which of the communications between the then-President and his advisers should remain confidential as it would to have a second husband decide which of his wife's conversations with her divorced first spouse should be subject to the marital privilege, or to have a substitute attorney determine which statements made by a client to the lawyer he first

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[30] Similarly, the interest in shielding high officials from burdensome responses to judicial subpoenas (J.S. App. 38a) may apply primarily to incumbents. Even here, however, former officeholders should be protected against vexatious and harassing demands once they leave public office in order not to "chill" prospective candidates for high government posts.

[31] In *Senate Select Committee* v. *Nixon*, 498 F.2d 725, 729 (D.C. Cir. 1974), the court of appeals called the presidential confidentiality privilege "*one species* of executive privilege" (emphasis added).

retained should remain secret, or to have a second priest decide which of a penitent's confessions to an earlier minister should be covered by the privilege.

Privileges designed to foster candor in relationships much less critical to the national interest than that between a President and his aides have been held not to terminate even upon the death of the party entitled to claim the privilege, unless waived by someone authorized to do so. *See, e.g., Massachusetts Mutual Life Ins. Co.* v. *Brei,* 311 F.2d 463, 469 (2d Cir. 1962) (physician-patient privilege); *Baldwin* v. *Commissioner of Internal Revenue,* 125 F.2d 812, 814 (9th Cir. 1942) (attorney-client privilege). To argue that an incumbent President's privilege ceases at the end of his term is as unjustified as the argument that the attorney-client privilege ceases at the termination of the attorney's representation of the client—a suggestion that has been flatly rejected by the courts. *United States* v. *Foster,* 309 F.2d 8, 15 (4th Cir. 1962).

The practical necessity of a former President being able to protect the confidentiality of his communications after leaving office was not lost on the district court (J.S. App. 39a-40a n. 28):

> The principal argument in favor of permitting a former President to retain authority to assert presidential privilege is that political partisanship might prevail over determination of the public interest were an incumbent administration alone to have the ability to assert privilege. Executive confidentiality would consequently be inadequately protected, and thus the ultimate purpose of the privilege—to encourage free and open communication by executive officials—would be undermined.

Having noted the argument, the court did not respond to it at all. We submit that no answer adequately addresses the problem. A subsequent administration may have little interest in protecting the confidentiality of the deliberations of former Presidents. Indeed, if the subsequent President is of a different political party, the interest may be precisely the opposite. And even if the incumbent believes revelations of a predecessor's deliberations are unwarranted, the political environment—such as that which exists with regard to former President Nixon's files—will most likely dictate whether an incumbent would feel free to invoke the privilege to prevent such disclosure. Put in its bluntest terms by way of illustration, assume that during the course of President Nixon's term in office he discussed with Republican congressional leaders their suggestions concerning pay increases for Members of Congress. Were we to accept the argument that Mr. Nixon can no longer assert any privilege to protect the confidentiality of those conversations, the decision as to whether they would be protected would rest upon whether or not the current Democratic President wished to have them publicly disclosed. Or, put in another context, would AFL-CIO President George Meany have spoken in confidence with President Johnson if he had felt that the confidentiality of his conversations would be left to the determinations of two successor Republican Presidents or their Administrators of GSA.?[32]

[32] The district court cited and discussed the Queens Bench decision of Lord Chief Justice Widgery in *Attorney General* v. *Jonathan Cape, Ltd.*, [1976] Q.B. 752 (1975), noting that the case was decided "in favor of publication." J.S. App. 42a-43a n. 30. In fact, however, much as was true in the parallel decision of this Court in *New York Times Co.* v. *United States*, 403 U.S. 713 (1971),

The right of a former President to decide when and if his communications would be made public had never been challenged prior to the close of the Nixon administration, so far as we are aware.[33] The closest precedent was a subpoena issued by a Committee of the House of

the court ruled in favor of publication because it was not prepared to enjoin publication of the material at issue (which it viewed as "a Draconian remedy" (*id.* at 767)), and because on his own examination of the book that was to be published, the Lord Chief Justice concluded (*id.* at 771): "I cannot believe that the publication at this interval of anything in volume one would inhibit free discussion in the Cabinet of today. . . ." In arriving at this result, however, the court held "that when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the court" (*id.* at 770) and that "the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence. . . ." (*id.* at 771). The British rule is, therefore, much closer to the principle suggested here by the Solicitor General—even if no President is available to assert the privilege it should apply. To be sure, the Lord Chief Justice did say that the confidentiality should lapse after a "limit in time," but it was never suggested that the incumbency of any Cabinet minister should affect the assertion of the privilege. And the time limit considered in the opinion ranged between 10 and 30 years.

[33] Only two judicial decisions have reached the issue to date. Judge Richey, in an opinion in the "consolidated cases" concluded that a former President could not assert a claim of privilege. *Nixon* v. *Sampson*, 389 F. Supp. 107 (D.D.C. 1975) (effectiveness of opinion and entry of order stayed); *see Nixon* v. *Richey*, 512 F.2d 427 (D.C. Cir. 1975). *Apton* v. *Wilson*, C.A. No. 798-72, and *Kuhn* v. *Wilson*, C.A. No. 956-71 (D.D.C. 1974) (consolidated cases) (Pratt, J.), held expressly to the contrary in granting the motion of former President Nixon to quash a subpoena *duces tecum* calling for the production of tape recordings, transcripts and documents reflecting or pertaining to certain presidential conversations.

The Court of Claims in *Sun Oil* v. *United States*, 514 F.2d 1020 (Ct. Cl. 1975), did not decide the issue. It assumed for purposes of its decision that a former President could assert the privilege, but concluded that, even if properly asserted, the documents in that case would be discoverable by civil litigants. *Id.* at 1025.

Representatives to former President Harry Truman in 1953, seeking his testimony on matters which occurred during his administration. Mr. Truman responded by letter stating in part (120 Cong. Rec. 17994 (daily ed. Oct. 2, 1974)):

> It must be obvious to you that if the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President.
>
> The doctrine would be shattered, and the President, contrary to our fundamental theory of constitutional government, would become a mere arm of the Legislative Branch of the Government if he would feel during his term of office that his every act might be subject to official inquiry and possible distortion for political purposes.

It strains credulity to assume that former President Truman, faced with a demand by a hostile Republican Congress to discuss his communications and actions in office, should have had to rely on President Eisenhower to assert a privilege of confidentiality on his behalf, or that President Truman's assertion on his own behalf was entitled to "much less weight." Our system has not operated in that fashion for two hundred years, and there is no sound legal or policy reason for changing it now.

D. The Unbroken Tradition of Presidents "Owning" The Materials They Accumulate While In Office Is Based Upon The Separation of Powers Principle.

We have referred previously to the fact that every President since the founding of this Nation has exercised the right to arrange for the preservation or disposition of the papers and effects he accumulated while in office. This indisputable fact is critical, for it underscores the separation of powers claim we assert here. The reason, of course, is that "constitutional power, when the text is doubtful, may be established by usage," *Inland Waterways* v. *Young,* 309 U.S. 517, 525 (1940), and "that in determining the meaning of a statute or the existence of power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation." *United States* v. *Midwest Oil Co.,* 236 U.S. 459, 473 (1915).

In rejecting our separation of powers claim, the district court made no mention whatever of the 200-year-old practice followed by every constitutional office-holder to date. This was a significant omission, for as Justice Frankfurter explained in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610-11 (1952) (concurring):

> Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.

The "deeply embedded traditional way of conducting government" at issue here has been engaged in by

every United States President from the inception of our government. It has been carried out openly and with the repeated recognition and approval of the other two branches and each President's successor in office. Accordingly, any assessment as to whether this tradition represents, as we believe, the tangible manifestation of the President's inherent power to control the internal affairs of his own office must afford proper weight to the "ownership" tradition.

1. *The Practice of All Constitutional Officeholders*

Few traditions followed by the three branches of our government are as deeply rooted and unvarying as the practice of each constitutional officeholder providing for the disposition of the materials of his office in the manner he or she deems most appropriate. From the beginning of the Republic, every President, Congressman and Supreme Court Justice has decided whether his papers should be placed in a library for research, published in literary works, destroyed, or disposed of in some other fashion. This tradition is so longstanding and of such independent importance that we have set forth in the Appendix at pages 421-442 a description of the past practices of fifteen Presidents, five Supreme Court Justices, and various Congressmen. The historical record demonstrates that each constitutional officeholder has, to the extent he desired, determined which of his papers he would take with him from office, protected the confidences reflected in them, preserved them for later use, or provided for their destruction.

The private appellees argue that the differing ways in which Presidents have disposed of their papers undercuts our reliance upon an unbroken tradition stemming from the origins of our Constitution. This ignores the point. The fact is that whether a particular President decided to (a) use his papers for literary endeavors (James Monroe, Exhibit H, p. v), (b) bequeath them to friends or relatives (George Washington, Exhibit C, p. vii; Thomas Jefferson, Exhibit F, p. 279; James Madison, Exhibit G, p. v; James Monroe, Exhibit H, p. vi; Martin Van Buren, Exhibit J; John Tyler, Exhibit M, p. v), (c) leave those papers he deemed appropriate with various departments of government (Theodore Roosevelt, Exhibit AA, p. v; William Howard Taft, Exhibit BB, p. vii), (d) destroy them (Franklin Pierce, Exhibit P, p. v; Chester A. Arthur, Exhibit W, p. 311; Calvin Coolidge, Exhibit EE, p. v),[34] or any combination of the above, it was invariably the outgoing President or those he trusted who determined the manner of disposition of his confidential materials.

A President's right to dispose of his papers and effects as he sees fit is similar in many respects, of course, to a person's right, under common law principles, to dispose of property he personally owns. Thus it is understandable that as each President took with him the materials he accumulated while in office the developing tradition was viewed in terms of common law property rights, rather than under principles of constitutional doctrine. Accordingly, it was quite natural for other incidents of common law ownership to be engrafted to the practice. Consequently, throughout the terms of Presidents spanning 200 years, presidential materials have been bequeathed to relatives, deeded

[34] All citations are to the stipulation and accompanying exhibits filed July 31, 1975.

to friends, donated to libraries, published as literary works, and sold to the government and private collectors. We believe that these additional incidents of ownership have been so firmly established by custom and usage that Mr. Nixon is entitled to enjoy the same property rights as did each of his predecessors in office. However, we do not contend that these additional incidents of ownership are constitutionally based. Only one—the right to control access to and disposition of the materials of his office—is rooted in the Constitution itself. Whether the others might be subjected to carefully drawn limitations not abridging other constitutionally protected rights is a question not presented here because, in this instance, Congress has passed a statute not affecting solely the incidents of common law ownership but one that cuts to the core of a constitutional officeholder's right to control the disposition of the materials of his office.

2. *Judicial Sanction of the Tradition*

The right of Presidents to dispose of the papers of their office, though viewed in common law ownership terms, has been repeatedly recognized and consented to by both the judicial and legislative branches of the government. As early as 1841, Mr. Justice Story, sitting on circuit, faced the question of a President's rights in the materials of his office. The case, *Folsom* v. *Marsh,* 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841), involved a copyright dispute in which the plaintiffs, who had acquired an exclusive copyright in the papers of George Washington, alleged infringement by the defendants' publication of a "Life of Washington." The papers in question consisted of both private correspondence and official letters and documents, a category which consisted of (9 F. Cas. at 344):

> Letters addressed by Washington, as commander-in-chief, to the president of congress. Official letters to governors of states and speakers of legislative bodies. Circular letters. General orders. Communications (official) addressed as president to his cabinet. Letter accepting the command of the army, on our expected war with France.

The defendants argued, *inter alia,* that (1) the papers were "designed by the author for public use" (*id.* at 345) and hence were not private property, and (2) the papers were "in their nature and character, either public or official letters, or private letters of business" (*id.*), and hence were not subject to copyright protection. Mr. Justice Story did not decide the copyright issue as to those documents classified as "official" correspondence, because the remainder of the papers were clearly subject to copyright and thus infringement was established. On the question of ownership of the papers, however, Mr. Justice Story's holding was unequivocal (*id.*):

> [I]t is most manifest, that President Washington deemed them his own private property, and bequeathed them to his nephew, the late Mr. Justice Washington, through whom the late Mr. Chief Justice Marshall and Mr. Sparks acquired an interest therein; and, as appears from the contract between these gentlemen, annexed to the report, the publication of these writings was undertaken by Mr. Sparks, as editor, for their joint benefit. . . . The publication of the defendants, therefore, to some extent, must be injurious to the rights of property of the representatives and assignees of President Washington. Indeed, as we shall presently see, congress have actually purchased these very letters and manuscripts, at a great price, for the benefit of the nation, from their owner and possessor under the will of Mr. Justice Washington,

> as private and most valuable property. That President Washington, therefore, intended them exclusively for public use, as a donation to the public, or did not esteem them of value as his own private property, appears to me to be a proposition, completely disproved by the evidence.[35]

The disposition of President Roosevelt's materials gave rise to another judicial decision dealing with a former President's ownership of his papers—the decision of the Surrogate Court, Dutchess County, New York, in *In re Roosevelt's Will*, 73 N.Y.S.2d 821 (1947). That case involved the validity of the gift by which President Franklin D. Roosevelt deeded his presidential materials to the United States. The court held that the actions of Roosevelt with respect to the materials, which included the entirety of the "White House Central Files" still at the White House at the time of F.D.R.'s death, together with delivery and

[35] In his discussion of the copyright question. Mr. Justice Story suggested that, of Washington's presidential materials held by Mr. Folsom, there might be a distinction to be drawn in terms of the publication or non-publication of ". . . official letters, addressed to the government, or any of its departments, by public officers . . ." *Id.* at 347. Although Mr. Justice Story did not hold that there necessarily was such a distinction, it is clear that the distinction he posited was quite narrow. It did not purport to, and certainly could not, justify governmental intrusion for any purpose into *all* of the papers and effects of a President, particularly those of a confidential, political or personal nature, which is what the Act challenged here accomplishes.

In short, the qualification in *Folsom* v. *Marsh*, most broadly construed, supports only the conclusion that the Attorney General drew in his opinion (J.S. App. 129a):

> [T]here has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity.

acceptance by the Archivist, were sufficient to "pass title" to the materials.[36]

3. *Legislative Acceptance of the Tradition*

Congressional acceptance of a President's right to control the disposition of his papers and effects can

[36] In attempting to discount nearly 200 years of precedent, appellees rely heavily on *Public Affairs Associates, Inc.* v. *Rickover*, 177 F. Supp. 601 (D.D.C. 1959), *aff'd in part*, 284 F.2d 262 (1960), *reversed and remanded*, 369 U.S. 111 (1962), *on remand*, 268 F. Supp. 444 (D.D.C. 1967), in which the court ultimately held that Admiral Rickover owned a copyright in two speeches delivered by him while occupying government positions. That case—like the second question discussed by Mr. Justice Story in *Folsom* v. *Marsh*—did not involve the question of *ownership* of papers at all; it involved only whether Admiral Rickover had a private *copyright* in the content of certain of his speeches. No one in the *Rickover* litigation challenged the Admiral's ownership of the manuscript of his speeches or the materials gathered for use in preparing them. The reasoning of the court in *Rickover* would apply only if Mr. Nixon asserted a copyright in a public speech made while he was President. It is not, however, applicable to the question of the former President's ownership of his hand-written drafts or the original manuscript of any such addresses. It is nonetheless significant that the Court emphasized in its opinion discussing the elements important in determining the copyright claim, 369 U.S. at 113, the factor of "administrative practice"—a factor which, given the uniform historical tradition and practice under the Presidential Libraries Act, plainly establishes ownership by former Presidents of their presidential papers.

United States v. *First Trust Co. of St. Paul*, 251 F.2d 686 (8th Cir. 1958), likewise affords no support for those challenging constitutional officeholders' ownership of their papers and effects. There the court of appeals affirmed the district court's finding that Captain William Clark's notes were not "an official work product of the Lewis and Clark Expedition," but were rather "made by [Captain Clark] for his personal use in subsequently preparing his own private diary. . . ." 251 F.2d at 688. The court distinguished the case of the notes of Captain Meriwether Lewis, commanding officer of the expedition, which had been kept by him and forwarded to the War Office in accordance with President Jefferson's explicit instructions.

be found as early as the nineteenth century when Congress appropriated funds to purchase portions of the papers of George Washington, Thomas Jefferson, James Madison, James Monroe, and Andrew Jackson. These affirmative actions by Congress, together with its acquiescence since the beginning of the Republic in the removal, disposal and occasional destruction of presidential materials by former Presidents, constitute powerful support for the principle that the papers relating to the conduct of the Presidency are the President's property. As this Court stated in *Myers* v. *United States*, 272 U.S. 52, 175 (1926):

> This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions.

Interestingly, Congress has not, by this legislation, changed the long-standing rule of law that Presidents and other constitutional officeholders own their papers. What it has done is to carve a retroactive exception to the rule for Richard Nixon. As recognized by the Senate Committee in its Report (S. Rep. No. 1181, 93d Cong. 2d Sess., 4-5 (1974):

> The legislation does not take any position with respect to the ownership of Mr. Nixon's tapes, papers and other materials. First of all, it is not clear that Congress can make a retroactive ruling as to whether these tapes and materials are or are not public property.

In 1955, Congress did consider fully the question of ownership when it debated the Presidential Libraries

Act, 44 U.S.C. 2107, 2108. The hearings on the Joint Resolutions which produced that legislation are replete with statements emphasizing that the presidential papers are the property of the former Presidents. Nowhere in the Hearings, the Committee Reports,[37] or the floor debate [38] on the 1955 Act was this principle challenged in the slightest. Indeed, that Act, which was designed to encourage voluntary donations of presidential materials and their acquisition by the United States, would have been wholly unnecessary had the papers been the property of the United States in the first place.

Congress has never retracted the approval it gave to the concept of presidential ownership in 1955.[39] The challenged legislation expressly ignores the issue, allowing the courts to determine, in light of the unbroken executive, congressional, and judicial recognition of the concept, who owns the papers of the Nixon administration.[40]

4. *The Practical Importance of the Tradition*

While judicial and congressional recognition of a right exercised by every Chief Executive provides a

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[37] S. Rep. No. 1189, 84th Cong. 1st Sess. (1955); H.R. Rep. No. 998, 84th Cong., 1st Sess. (1955).

[38] 101 Cong. Rec. 8834-38 (1955).

[39] Contemporaneous with Congress' consideration of the Act, the Congressional Research Service of the Library of Congress concluded that a President's ownership of his presidential materials is clearly established. Memorandum of the Library of Congress, Congressional Research Service, "Ownership of Presidential Papers," dated September 24, 1974. (Exhibit G, Pl's. Evid. Sub., filed June 30, 1975).

[40] S. Rep. No. 1181, 93d Cong., 2d Sess. 4-5 (1974).

strong basis for the separation of powers claim we present, the crucial element lies in the fact that the exercise of that right is necessary and appropriate to the functioning of the President's office. The reasons stem largely from practical considerations, some of which have been accurately noted by numerous students of presidential materials and by several Presidents themselves.[41] One such statement by a former administrative assistant to President Truman is particularly apropo:[42]

> [T]here are very sound reasons for the decision that presidential papers are the property of the President, as well as an unbroken line of precedents from Washington down through Truman.
>
> The Presidency is a constitutional office and as such has an independence like that of the other two branches of the Government.
>
> * * * * * * *
>
> This principle would, however, be overriden if after the end of a President's term in office his papers were assimilated to those of an executive department and subjected to the control of the succeeding administration and the legislative branch. Obviously, if presidential papers could be thrown open to public scrutiny as soon as a president left office, there would not be much privacy about them while he was in office. Few would write to a President in confidence, and few Presidents would put their private thoughts on paper if the

[41] See R. D. W. Conner *The Franklin D. Roosevelt Library.* Am. Archivist 3, 83 (1940) (quoting President Grover Cleveland); William Howard Taft, The President and His Powers 34 (New York: Columbia Univ. Press, 1967).

[42] David D. Lloyd, *The Harry S. Truman Library,* 18 Am. Archivist 99, 101-02 (1955).

> expiration of the presidential term were to be a signal for disclosure. And as a consequence the ability of the President to function as an independent officer of the Government would be curtailed, if not crippled, and our constitutional framework would be damaged.
>
> These, to me, are the fundamental constitutional and political reasons that justify the rule that our Presidents own their papers. And if we wish to mitigate the burden this imposes on ex-Presidents we should provide the sort of depository for their files over which they will have as much control as if they had personal possession.

The attempt by Congress here retroactively to deprive a President of the right to control the disposition of his papers and effects is singularly intrusive upon the separation of powers because the previously unbroken tradition has itself shaped the way Presidents record and preserve their thoughts and deliberations. Can it seriously be argued that if a President's diaries and dictated recollections are to be seized, reviewed and possibly made public upon the expiration of his term, he will feel free to record candidly his thoughts and preserve them in the White House? Is it likely that he will save, rather than destroy, the frank communications between himself and others about public personalities, or about political decisions? These memorializations—not to mention the recordings of conversation—were created and retained by Mr. Nixon and other prior Presidents on the assurance that the tradition of presidential ownership and control of disclosure was more than just a practice existing at the sufferance of Congress. We do not believe Congress can constitutionally change the practice, at least in the wholesale fashion effected by the present

Act, even as to future Presidents. But it is absolutely clear that with respect to *past* presidential documentation, Congress' power is circumscribed by the tradition that has become a vital part of the prerogatives of the President.

E. No "Public Interest" That Congress May Implement Over A President's Objection Justifies The Involuntary Seizure, Screening And Accessibility Of Presidential Materials.

While minimizing the "forcefulness" of the presidential privilege claim made by former Presidents and the gravity of the harm done to that privilege by an intrusion of the kind prescribed by this Act, the district court acknowledged that there was *some effect* on presidential confidentiality as a result of the law. It then balanced this effect against "important public interests" which it enumerated in some detail (J.S. App. 48a-61a). The district court's conclusion was "that the great importance of congressional purposes here far outweighs the need to prevent the very limited intrusion on whatever interest—if any—in presidential confidentiality Mr. Nixon may assert . . ." (J.S. App. 64a-65a.) We disagree, for reasons already stated, with the district court's diminution of the President's interests that militate against compelled sequestration, screening and disclosure of his materials. We turn our attention now to the interests the court said support the challenged Act. We maintain, first, that the "balancing test" employed by the court below is inapplicable to our separation of powers claim. We then note that, in any event, the cited interests—several of which appear really to be after-the-fact rationalizations devised to sustain a law that enacted in haste—simply do not justify what Congress has done.

1. The Impropriety of the "Balancing Test"

The district court assumed that the constitutionality of this law was to be determined by comparing the concerns Congress may have had in enacting the law with the objections that the appellant, as a former President, could assert to it. This mode of analysis is appropriate in many cases involving alleged violations of the First or Fourth Amendments. But it is simply inapposite where the issues concern the proper allocation of functions among the executive, legislative and judicial branches.

The most recent illustration of this point is found in this Court's separation of powers analysis in *Buckley* v. *Valeo,* 424 U.S. 1, 118-137 (1976). The issue there was whether Congress had encroached upon the Executive's constitutional authority under the Appointments Clause by providing in the 1974 amendments to the Federal Election Campaign Act for the creation of a Federal Election Commission, four of whose voting members were to be nominated by the President *pro-tempore* of the Senate and the Speaker of the House. A unanimous Court held that the vesting of the appointment power in the named Members of Congress was unconstitutional. None of the opinions even suggested that the relevant issue was whether the "interests" Congress was seeking to implement by conferring that power on its own members "outweighed" the President's "interests" in having exclusive control over the appointment of members of the Commission. Rather, the dispositive question was whether the legislative enactment was consistent with the powers that the Framers of the Constitution had intended to allocate and with the judicial decisions that had interpreted those powers.

There were, of course, "important public interests" to be served by distributing nominations to the Federal Election Commission among various branches of government. And conversely, it was surely open to argument that the impact on the President's appointment power would be "minimal" if these four federal officials exercising independent authority were named by Congressmen. But separation of powers issues are not decided by balancing the "interests" of one branch in encroachment and the "interests" of the other in resisting such invasion. If there is, in fact, encroachment by the Congress on a province that is exclusively the President's, or by the President into an area that is legislative, the overstepping of the line must be condemned.

Myers v. *United States,* 272 U.S. 52 (1926), and *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952) (the *"Steel Seizure Case"*), demonstrate how the principle works in the case of unauthorized action by either branch. There were certainly substantial policy interests that could have justified Congress' wish, in the Tenure of Office Act, to have a say in whether an executive branch officer would be dismissed. The intrusion into the President's authority seemed relatively slight; he still retained the sole power to *initiate* a dismissal, and all that he needed to carry one out was the approval of the Senate. Nonetheless, the Court did not "balance" these interests; it struck down the legislation as violative of the separation of powers doctrine.

Conversely, in the *Steel Seizure Case,* the public interests supporting President Truman's action were immense. The national defense in the midst of a war was jeopardized by the nationwide work stoppage

which President Truman sought to avert. He acted by seizing the Nation's steel mills and promptly requesting Congress to pass legislation, if it thought legislation appropriate. 343 U.S. at 675-677 (Vinson, J., dissenting). The record appeared to establish that a majority of Congress viewed the President's action as a "minimal" intrusion upon its constitutional power; Congress refused to act even though the President, in a formal communication stated: "The Congress can, if it wishes, reject the course of action I have followed in this matter." 343 U.S. at 677.

Application of a "balancing test" in the *Steel Seizure Case* would, we submit, have required this Court to sustain President Truman's seizure. But a majority of the Court decided, in a brief opinion, that Congress had "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.' " 343 U.S. at 588-589. The "lawmaking power" was said to be entrusted "to the Congress alone in both good and bad times," and the President's exercise of authority was, therefore, held unconstitutional. *Id.* at 589.

The present case is the first, to our knowledge, in which a court has held that an intrusion into an area reserved to one branch of government under the separation of powers principle may be justified by interests—not of constitutional dimension nor even essential to the performance of the other branch's duties—that supposedly "outweigh" the constitutionally protected interest. In *United States* v. *Nixon,* 418 U.S. 683 (1974), this Court did, to be sure, weigh a President's "generalized interest in confidentiality" against the constitutional demands of the Fifth and Sixth Amend-

ments, which express "our historic commitment to the rule of law." 418 U.S. at 708, 711-12. In other words, the Court in *Nixon* weighed interests that were central to the Executive's and Judiciary's respective roles under the Constitution (*i.e.*, the need for specific evidence for the administration of criminal justice, against the general promotion of candid advice in the executive decisionmaking process). In this case, neither of the two interests cited by the district court as seemingly sufficient to support the full sweep of the Act—historical preservation and access by executive officials—is central to the roles of the judicial or legislative branches. Absent the Act, neither branch would be impaired in its functions.[43] On the other hand, the Act's intrusion on presidential confidentiality is likely to be great, and the breadth of disclosure—at least for sequestration and screening purposes—is all-encompassing. Accordingly, balancing is improper here.

It is only when "interests" central to the constitutionally allocated responsibilities of the several branches come into direct conflict that the court must choose one or the other. For example, in *United States* v. *AT&T*, No. 76-1372 (D.C. Cir., December 30, 1976), the court of appeals faced just such a confrontation between the legislature's right to subpoena items needed to perform its oversight responsibilities and the President's right to preclude disclosure of information detrimental to the national security. The court was extremely reluctant to begin "balancing" even as

[43] To the extent that the subordinate interest—availability of evidence in civil and criminal trials and access to the materials by Congress for purposes of legislative reform—speak to the operations of the other branches, their needs may be accommodated by a less intrusive alternative. (See discussion *infra*, 121-130.)

to interests supporting the constitutional responsibilities of the respective branches and avoided doing so by resubmitting the question to the parties for further negotiation (*id.* at 25). The obvious difficulties the court of appeals saw illustrate the impropriety of "balancing," especially where one branch's action to promote some "public interest"—legitimate as it might otherwise be—is at the expense of intruding upon another branch's area of constitutional responsibility.

In addition, balancing is inappropriate where, as here, the "interests" being promoted to justify a breach of the separation of powers is not unique to the branch seeking to exercise power over the other. Assuming, *arguendo,* that balancing were proper here, the interests enumerated by the district court do not relate to the question of *which* branch of government should act. As the district court noted, "The simplest way of describing the public interests served by the Act is to merge all of them under the rubric of preservation of an accurate and complete historical record (J.S. App. 48a-49a). We agree, of course, that Congress has a legitimate general interest in preserving an accurate history of this country, but the interest in historical preservation—particularly as applied to presidential materials—is shared by the executive branch.[44] To disqualify a former President because of his self-interest and the natural wish that history treat him kindly would require disqualification of a Senator or Representative with regard to his materials, or a Justice of this Court who is deciding whether to deposit his papers in an appropriate library or to destroy them. Does

[44] In fact, Mr. Nixon's purpose under the depository agreement was precisely to make the vast majority of his materials available "for research and study." (J.S. App. 134a).

the interest of "preservation of an accurate and complete historical record" mean that a President may direct the sequestration and screening by the Librarian of Congress of all a Senate Minority Leader's documents or that he may order a United States Marshal to seize and review all of a Chief Justice's papers?

2. *The Preservation of Historical Materials*

The district court asserted that "the Act serves the national interest by preserving materials upon which historians must draw in order accurately to recount and to judge the political history of our time" (J.S. App. 49a). The terms in which the court below describes this "national interest" makes this proposition appear as indisputable as motherhood and allegiance to the flag. In fact, the preservation of *all* materials relating to the internal operations of a high government office for historical scrutiny is a subject over which there is continuing debate.

There is a substantial body of opinion that too much internal data is being made available to historians and being publicly disseminated. Books by intimates of President Eisenhower, such as Emmet John Hughes' The Ordeal of Power (1963) and Robert J. Donovan's Eisenhower: The Inside Story (1956), aroused strong feeling that presidential confidences were being violated. See Sickels, Presidential Transactions, 54 (Prentice Hall 1974); Schlesinger, The Imperial Presidency 370 (Houghton Mifflin 1973). The same reaction followed publications by close associates of President Lyndon B. Johnson—George Reedy's The Twilight of the Presidency (1970) and Eric Goldman's The Tragedy of Lyndon Johnson (1969). Arthur Schlesinger, Jr. reports that, as a result of Donovan's

revelations, "the keeping of cabinet minutes came to an end." Schlesinger, *supra* at 370.

Possibly the most public dispute on the desirability of the type of disclosure advocated by the court below was the one which surrounded the publication of Professor Alpheus Thomas Mason's biography of Chief Justice Harlan Fiske Stone (Harlan Fiske Stone: Pillar of the Law (Viking 1956)). As Mason indicated in his acknowledgement, he received "unrestricted access" from the Chief Justice's widow to all of "his personal correspondence, private and public papers." As a result, the book contained many disclosures about internal operations and decisionmaking that were of legitimate historical interest, but that were viewed by many scholars of this Court as damaging to its processes. One well-known reviewer said:[45]

> One result is the release of a great quantity of material which had hitherto been regarded as secret. This may prove regrettable, because justices will scarcely be able to carry on their most confidential business with the same freedom as before if they suppose that their every move is being recorded for the biographers. Here even the most confidential of all matters, the conference itself, is exposed by occasional notes concerning conferences dictated by Stone upon his return to his office. On the other hand, the justices' loss will now be the historians' gain, because other justices will undoubtedly make available similar materials for the past.

The prediction was not quite accurate. The late Justices Black and Harlan did not "make available simi-

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[45] John P. Frank, *Harlan Fiske Stone: An Estimate*, 9 Stan. L. Rev., 621, 631 (1957).

lar materials." They believed that the historians' interest was outweighed by the Court's interest in total and permanent confidentiality. Accordingly, they burned their internal Court papers before they died. *See* Black, My Father: A Remembrance (1975). This followed the precedent set by Justices such as Wayne, Miller, Lurton, Peckham, E. D. White, McKenna, Cardozo and Jackson. Manuscript Division, Library of Congress, *Location of the Personal Papers of Justices of the U.S. Supreme Court,* Case File Memorandum (1956); Westin, Book Review, 66 Yale L.J. 462, 468 (1957).

Another reviewer doubted that Mason's disclosures were wise because they raised the question: "[w]ill Justices in the future exchange their ideas, in writing, as freely and unreservedly as they should; or will they find themselves, in writing to each other, addressing some future generation of popular readers?" [46] And another reviewer observed, "The question arises, however, whether some of Mason's disclosures had not better been withheld." [47] Yet another reviewer was not so kind: [48]

> It would seem to me that for an evaluation and understanding of Supreme Court decisions and opinions the publication of these materials serves no useful purpose. In deciding whether *X* v. *Y* is a good or bad decision, or whether the opinion enunciates a good or bad principle, or whether the

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[46] Westwood, Book Review, 43 Va. L. Rev. 297, 301 (1957).

[47] Harris, Book Review, 43 Iowa L. Rev. 456, 457 (1958).

[48] Dunham, Book Review, 24 U. Chi. L. Rev. 794, 797 (1957).

rule it establishes is likely or unlikely to survive, it does not help us to know that the Court did not even discuss the issues written about in the opinion or that the opinion was modified to accommodate views of colleagues on the Court or sensibilities of co-ordinate departments, or that a judge thought the approach or conclusion finally adopted by his colleague was suggested by a law clerk. Unlike most decision-makers in and out of government, judges by convention are required to state publicly reasons for conclusions reached, and these stated reasons influence, or fail to influence, the law and other judges. There is no contribution to advancement of knowledge in this area by reason of publication of these letters.

It is possible that such material may give insight into the judge's conception of his role or roles as judge, and that from such material we can discern and evaluate the possible roles a judge may play. Mason has not organized the material for this purpose, nor does he draw much in the way of conclusions from it, although he has limited himself in part by his selection of cases and in much larger part by an attempt to tell a story about the cases used. Mason, in making use of these materials, has not helped to disclose Stone's concept of his judicial role in making decisions. Absent this use, or publication for literary value, disclosure of such memoranda and letters is more than indiscreet; it is useless.

> Unless these memoranda and letters contribute to an understanding of the decision-making process, there is very little excuse for publication. They may not be tittle-tattle but they are used as such.

A leading scholar of the Court, Professor Alan F. Westin, took an intermediate ground, and concluded that "[a] time restriction on judicial papers . . . is both

wise and proper.'"[49] His ultimate judgment, however, is particularly important for this case (*id.*):

> Clearly, the primary responsibility in disclosing judicial papers rests on the Justice himself.

It is undesirable and inappropriate for Congress to replace the judgment of "the Justice himself" with its own evaluation as to whether the historian's need overrides the Court's. It is equally inappropriate for Congress to make this judgment in place of the President, who is in a far better position to weigh the impact of disclosure than Congress or the Administrator of GSA and who is more capable of evaluating the Presidency's interest in confidentiality than archivists who have the public disclosure bias of historians.

While it may be true, therefore, that Congress wishes to preserve materials useful for "political history of our time," it was not Congress' province to decide that this "interest" outweighs the President's interest in confidentiality. That judgment is not so universal or so "integral to a society based on democratic principles" (J. S. App. 51a-52a) that it is entitled to unquestioning adherence. We might suggest, with some deference, that if Congress believes the historians' interest so clearly outweighs the benefits of confidentiality in decisionmaking, it should begin to implement that decision in its *own* realm by enacting such legislation with respect to congressional records, and not take the first experimental step with the papers of the head of the executive branch.

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[49] Westin, Book Review, 66 Yale L.J. 462, 469 (1957). Compare the view of Lord Chief Justice Widgery discussed at note 32, *supra*.

3. Availability for Successive Administrations

The second interest that the district court believed to be "of special importance" (J.S. App. 49a, 52a) was for the government to have "continued access to documents of the outgoing administration" (*id.* at 53a). The court relied on the fact that there were "numerous examples in the record of incumbent administrations having to apply to presidential libraries for permission to examine records of past government actions that relate to current government problems," and, the court said, "Congress could legitimately believe it important to legislate, as it did, to ensure that this need is served by a regularized and certain procedure" (J.S. App. 54a-55a, 56a-57a).

The fact is that Congress had absolutely no basis for such a belief. Not one government official testified before a single congressional committee concerning any need to assure future administrations of ready access to the files of Mr. Nixon's administration. Moreover, the government's effort during the course of this litigation to unearth instances demonstrating such a need in past administrations has produced a record documenting that such a need has been extraordinarily rare during the 200-year history of this country.[50]

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[50] One of the few instances in which an incumbent administration has sought access to the files of a former President occurred in the early 1960's when a request was made by staff members of President Kennedy to former President Eisenhower for a copy of the 1956 telegram concerning the Suez crisis from Ambassador Douglas Dillon to the State Department. The court below viewed this as a remarkable situation, illustrating the need for Congress to step into the breach to assure that future administrations would have access to Mr. Nixon's files. J.S. App. 55a-56a & n. 42. The district court,

With regard to this interest of ongoing government business, two questions that spring immediately to mind are (1) why, if "regularization" was Congress' purpose, did Congress choose to limit its directive to the papers of former President Nixon and not reach future Presidents such as President Ford, who, under the terms of deposit of his presidential materials with the government, will make the decision as to what material he considers personal and thus outside the scope of his agreement, and (2) by what right may Congress "regularize" the transition of records from one President to another, when this is more properly a subject for arrangement between the two Chief Executives. In fact, one of the objectives of the depository agreement of September 6, 1974, was to provide a mechanism whereby any necessary papers would be made available to President Ford and the agreement apparently satisfied the interests of Mr. Nixon's successor.[51] It

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however, described the situation divorced of the political environment of the time. The request to President Eisenhower followed on the heels of several attacks by the Kennedy administration upon President Eisenhower for his handling of the Suez crisis, which precipitated the Dillon telegram. President Eisenhower, cognizant of those attacks, took the position that if the information sought was truly for national security purposes, and not for partisan political reasons, the request should be made by the then incumbent or the Secretary of Defense (*See* App. 195-97). What this incident demonstrates is that there can be an occasion in which national security interests and partisan political concerns intersect and which, therefore, create the potential for isolated disputes between Chief Executives. However, such an incident in no way justifies the seizure of massive amounts of a President's political files, which could in no way relate to the ongoing affairs of government.

[51] The district court rejected President Ford's acceptance of the agreement by saying, "We do not believe that approval of a brand

seems entirely clear from the legislative history that this interest in "availability of documents" is an after-the-fact rationalization, not remotely contemplated by a single Senator or Representative who voted on the measure.

More fundamental, however, than the surface objections to this justification are the real facts that underlie it. Access to papers needed for ongoing governmental purposes has not been a serious or recurring problem in the past. Changed policies implemented by Mr. Nixon while he was President substantially reduced the possibility of isolated occurrences of this kind, and the papers which are at issue in this case are not the kind that present this problem. Moreover, specific instructions were given at the time of the transition to all White House staff members to retain copies of any items they might need for future use (App. 402). Indeed, the *only* evidence submitted by the government during this litigation to sustain the "government access" justification pertains exclusively to one distinct portion of Mr. Nixon's files maintained for him by the National Security Council, hardly compelling enough to support a statute seizing millions of documents as to which no evidence has ever been adduced demonstrating a continuing need for

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new Chief Executive of an agreement negotiated in some haste and, as plaintiff himself notes . . . in a time of some turbulence, necessarily represents the considered judgment of the Executive branch, especially since such a contention is to some extent inconsistent with President Ford's having signed the Act." J.S. App. 57a n. 43. In fact, this law was enacted "in some haste and . . . in a time of turbulence," and President Ford's signature upon it is no more of a "considered judgment" than was his approval of the depository agreement.

access.[52] Nonetheless, the appellees asserted below that if Congress had not acted to deprive Mr. Nixon of his presidential materials, his control over those materials would cripple the business of government. But the government and the private appellees are well aware—as was Congress—that *every* former President has at the end of his service immediately cleared the White House of the entirety of the materials of his administration, and that only on very rare occasions has the succeeding administration felt a need for *any* access to those materials. In light of this fact, one is hard put to explain how Mr. Nixon's control over the overwhelming majority of the materials at issue here—the millions of routine letters, cards or invitations to or from the President, the reams of bulk printed material, and the routine files, which are of little concern either to Congress or to the appellees—would bring the government to a halt. And it is particularly telling in this regard that since the date Mr. Nixon resigned from office more than two years ago, there has not been a single request by the executive branch for access to the tape recordings of his conversations for purposes of continuing government business.

In concluding our discussion of this alleged "interest," two final points are worth noting:

First, the right of the executive branch to secure particular materials of Mr. Nixon's administration for

[52] The "need" for access to Mr. Nixon's National Security Counsel files at the time the government's evidence was submitted had included about a dozen instances to do such things as checking the "guest list" for a dinner given for Prime Minister Trudeau, checking dates on backchannel traffic, responding to FOIA requests, and attempting to identify a paper requested by the Church Committee (App. 665-693).

current government business has been established by historical practice and by *Folsom* v. *Marsh,* 9 F. Cas. 342 (No. 4901) (C.C.D. Mass. 1841) (Story, Circuit Justice).) That right, if it *ever* needs to be exercised, exists *independent of any legislation by Congress.*

Second, this case does not involve an Act giving the incumbent President special rights of access limited to documents needed for ongoing business. The Act simply seizes every single document, recording or object produced and maintained in the White House by Mr. Nixon and his personal staff and directs their search and ultimate public disclosure. The reach of the Act bears no resemblance to the situation hypothesized by Mr. Justice Story in *Folsom* v. *Marsh,* for it goes far beyond national security and current government business.

4. *The Subordinate Interests*

The district court enumerated three interests that it deemed less significant, but nonetheless relevant. The first relates to the "Watergate affair" and the judgment that allegations covering it "have undermined the nation's faith in its political processes and its confidence in its future." On this basis, "a full airing of these events by disclosure of materials whose contents are peculiarly informative" was viewed as a "legitimate congressional pursuit" (J.S. App. 58a).

But the items seized do not in any manner coincide with that legislative "pursuit." The Act's time frame far exceeds any that relates to the "Watergate affair" and the subject of the materials sequestered is not limited to the matters that allegedly affect national

morale.[53] More fundamentally, the license given Congress by legitimization of such an interest is extraordinary. Every presidential action that is unpopular in one quarter or another could, by the same description, become a subject for the "airing of these events by the disclosure of materials whose contents are peculiarly informative." Inflation and unemployment have undermined the nation's "confidence in its future." Could Congress sequester all of President Ford's internal memoranda and notes of conferences on the "WIN" program and on national economic policy in order to "air the events" for the public? If the refusal to grant amnesty to those evading service in the Vietnam war is found by Congress to have "undermined the nation's faith in its political processes," may Congress force disclosure of memoranda given to the President on the subject?

The criminal process provides whatever public remedy is appropriate to deal with concerns of this kind. To the extent that there was reason to believe criminal laws were violated, grand juries have conducted investigations, indictments have been returned and trials have been held. If the President's conduct was being

[53] The overbreadth of the Act with respect to the "Watergate" interest is demonstrated by the fact that the Watergate Special Prosecutor, under an agreement reached informally with Mr. Nixon's counsel, completely satisfied his needs with respect to access to Mr. Nixon's tape recordings by requesting 55 conversations he assumed might pertain to possible violations of criminal law. Only 43 of the designated conversations in fact took place, and of those only 16 pertained to the subject matter of the Special Prosecutor's inquiry. In short, out of approximately three and a half years of recorded conversations available to the Special Prosecutor, only 16 conversations were relevant to his "Watergate" inquiries. The Special Prosecutor has withdrawn from this litigation because his interests have been fully satisfied. Motion of Special Prosecutor for Leave to Withdraw, September 8, 1975.

challenged, the proper route for that was by invoking the Impeachment Clause, which was done. Beyond that, it has been clearly established by *Watkins* v. *United States,* 354 U.S. 178, 200 (1957), and *Barenblatt v. United States,* 360 U.S. 109, 133 (1959), that "there is no congressional power to expose for the sake of exposure." The "interest" relied on by the district court was "exposure" for its sake alone.

A second asserted subordinate interest is even more extraordinary and totally destructive of the separation of powers doctrine. The court below stated that Congress might need Mr. Nixon's presidential materials in order to enact legislation, presumably in relation to the operation of the Presidency (J.S. App. 59a). In this respect, the Act itself does not dare tread as far as the district court did. It does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it. Plainly, a law that would subject internal presidential memoranda directly to congressional scrutiny for possible legislative purposes in structuring the "institutional design" of the Presidency would be an outrageous affront to the separation of powers principle. Could the President have his appointed Attorney General or United States Attorney seize the entirety of a Senator's internal files so as to make informed policy decisions and propose legislation streamlining congressional procedures? Could either the President or Congress seize all the papers of a Justice of this Court as "a necessary predicate to informed consideration" of proposed legislation improving the judicial process?[54]

[54] J. Lee Rankin, counsel to the Public Documents Commission established under Title II of the Act which is currently considering

The final "interest" cited by the district court was the need to maintain the materials in case they are ever needed in civil or criminal litigation (J.S. App. 60a-61a). The former President's depository agreement specifically provided for such availability for a period of years—five for the tape recordings and three for documentary materials (App. 111-112). The district court discounted this fact, however, by hypothesizing that Mr. Nixon and the Administrator (to whom Congress entrusted the materials totally under the Act) might change the agreement to cover a shorter period (App. 61a). And the court speculated that future cases might arise requiring access beyond the three and five year periods (App. 61a).

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legislation with respect to the materials of all future constitutional officeholders, cites this interest as one which could justify legislation concerning the papers of justices and judges. In Mr. Rankin's words:

> to the extent, however, that greater public knowledge of the judicial process can be said to promote wider public understanding of governmental processes generally, such greater education of the public can influence voters' decisions. Though federal judges are not directly chosen or subject to recall at the polls, public pressure can be brought to bear on the elected representatives of the people who make those choices. The Commission will, therefore, want to consider the extent to which greater access to judicial materials might facilitate the public's exercise of First Amendment rights.
>
> . . . .
>
> The Commission will also want to consider whether Congress needs greater access . . . to the records of the judiciary. . . . It is also possible, since Congress often legislates in areas first entered upon by judges and has the constitutional power to alter the court's jurisdiction, that greater access to judicial records would aid the Congress in the exercise of its legislative responsibilities (subject to protection of all rights and privileges).

[Memorandum of Commission counsel, Public Documents Commission, October 5, 1976, at 6, 10-11]

The problem with the court's explanation of this interest is that the only problems it cited could have been accommodated fully by more precise and narrow measures than the present Act. A simple criminal statute prohibiting destruction of any item would have carried out the goal of future availability. And if such a law were thought not to be sufficient safeguard, all materials might be held in joint custody for an extended period of time—well beyond any conceivable statute of limitations. In short, this "interest" could only justify *retention* of the materials, not the extraordinarily expansive, time consuming and intrusive procedure of screening, transcribing, classifying and allowing public access. If Congress' legitimate interest was preservation for judicial action, these other measures provided by the Act must be stricken as unnecessary and unconstitutionally intrusive.

F. The Act Is Overbroad In Relation To Whatever Legitimate Interests Are Cited To Sustain It.

For the reasons discussed above, we submit that Title I of the Act is unconstitutional because it invades the sphere of authority reserved to the President under the Constitution. We turn now, however, to an alternative argument that assumes, *arguendo*, that Congress could, with appropriate legislation, subject certain presidential materials to the kind of sequestration, screening and public disclosure that this Act contemplates. Even if one were to agree that such an objective is permissible, the means chosen by Congress in this Act are unconstitutional because they go beyond what is reasonably necessary to achieve any legitimate legislative objective.

We have discussed previously (pp. 49-52, *supra*), the reasons why we believe that it is appropriate to

utilize, for purposes of the separation of powers issue, the same "overbreadth" analysis that this Court has applied repeatedly to First Amendment cases. Not only is this a situation where First Amendment rights are directly involved (see pp. 164-176, *infra*),[55] but the same "chilling effect" that stifles constitutionally protected expression or association when it is the subject of an overbroad law comes into play when a sweeping statute relates to an area assigned exclusively or primarily to a branch of government other than the legislature. If an overbroad law that restricts presidential authority or inhibits presidential confidentiality is permitted to stand, future Presidents—apprehending that such a law might be applied to them—will alter the way they perform their duties. A sweeping law such as this one might well reduce the memorialization of various steps in the presidential decisionmaking process or might encourage an incumbent President to institute a policy, while he is in office, of routine destruction of documents reflecting internal deliberations.

For this phase of our argument, we assume, *arguendo,* that Congress could have enacted a law that sequestered the public documents of Mr. Nixon's Presidency—*i.e.,* those items that were produced by him in an official capacity or that related to his official functions.[56] We assume further that Congress could have directed that this limited class of documents be subjected to a screening and evaluation process directed towards publication of some or all of them. But it does not follow from these assumptions that the law actually enacted—which goes far beyond any legitimate legislative objective—is constitutionally permissible.

[55] A President's freedom of political expression and association can be effectively stifled by an overbroad law that seizes and subjects to word-by-word review all of his personal conversations. It is not fanciful to assume that if a law such as this one is sustained, future Presidents will not reduce to writing their messages or notes on political subjects and will surely not record any thoughts or conversations on sensitive political topics.

[56] In this regard, the provisions of the proposed but rejected floor amendment to the Act (see note ——, *supra*) are illustrative of a more limited definition.

We begin with the proposition reaffirmed by this Court in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217-18 (1975), that "[w]here First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." In this statute, as in the law appraised in *Erznoznik,* both prerequisites are absent. As we have previously discussed (pp. 33-36, *supra*) the extraordinarily broad sweep of Section 101 brings within its coverage every possible piece of Nixon memorabilia, whether or not there is a legitimate national interest in examining it and subjecting it to public disclosure. The fact that, as the court below recognized, "[v]irtually any item might be needed by a historian" (J.S. App. 62a), aggravates and does not resolve, the overreach of the statute. A historian may believe there is public interest or curiosity in some aspect of a President's behavior or in some internal bickering within a President's staff; the historian's interest is not, however, the lodestar of the national interest. Calvin Coolidge remarked in his The Autobiography of Calvin Coolidge (1929) p. 184:

> Everything that the President does potentially at least is of such great importance that he must be constantly on guard. This applies not only to himself, but to everybody about him. Not only in all his official actions, but in all his social intercourse, and even in his recreation and repose, he is constantly watched by a multitude of eyes to

> determine if there is anything unusual, extraordinary, or irregular, which can be set down in praise or in blame. Oftentimes trifling incidents, some insignificant action, or unfortunate phrase in an address, an injudicious letter, a lack of patience towards someone who presents an impossible proposition, too much attention to one person, or too little courtesy towards another have been magnified into the sensation of the hour. While such events finally sink into their proper place in history as too small for consideration, if they occur frequently they create an atmosphere of distraction that might seriously interfere with the conduct of public business which is really important.

The kinds of items sequestered by the Act are, therefore, far more extensive than any legitimate governmental objective. This breadth runs afoul of the constitutional standard applied by this Court to similarly broad mail censorship regulations held invalid on their face in *Procunier* v. *Martinez,* 416 U.S. 396 (1974). Among the tests applied there by the Court was the rule that (416 U.S. at 413-414; emphasis added):

> the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration *will nevertheless be invalid if its sweep is unnecessarily broad.*

This proposition had its genesis in *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960), where the Court noted that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

For reasons we have previously outlined, various sections of Title I of the Act must be invalidated under this standard. In Section 102(d), Congress has overbroadly granted future executive officials access to internal documents and conversations reflecting political deliberations among Mr. Nixon and his advisers. The statutory criterion—"lawful Government use"—is not coextensive with the policy that is being implemented. If Section 102(d) is intended to relate to the few instances when ongoing government operations might require access to Mr. Nixon's materials (see pp. 113-117, *supra*), the statute should have been more narrowly drawn to limit the availability of the materials to those situations. And it was not necessary, in order to achieve this purpose, to subject all of Mr. Nixon's materials at the outset to the screening and review process which the Act contemplates.

Nor was it necessary to sequester all of the former President's materials in order "to assure a full and accurate account of 'Watergate' and to provide a basis for legislation and executive action to prevent future 'Watergates.'" H.R. Rep. No. 1507, 93d Cong., 2d Sess. 8 (1974). The challenged legislation authorizes a full review by a staff of government employees of millions of documents and thousands of hours of tapes on countless domestic and foreign issues, and personal and political topics totally unrelated to "Watergate." In fact, sponsors of the Act specifically *refused* to amend the Senate bill to limit its scope to the Watergate period. 120 Cong. Rec. 18248 (1974). One would be hard pressed to describe such legislation as anything but "unlimited and indiscriminate" in its scope, going "far beyond what might be justified in the exercise of the State's legitimate inquiry." *Shelton* v. *Tucker,* 364 U.S. 479, 490 (1960).

Finally, there is no justification that has been enunciated or that may be conceived that would explain why, since the only interest warranting seizure of all the materials is historical preservation, this Act is limited to those of only one President in the Nation's history.[57] In this statute, Congress has singled out one former President from all the others by abrogating his depository agreement, executed pursuant to 44 U.S.C. 2107, while leaving untouched those of other Presidents executed under the very same statute. Their agreements, like Mr. Nixon's, provide for deposits subject to the donor's ability to restrict access to any materials he or his designees deem embarrassing to the donor, his family, or other persons including relatives and friends (Hoover, App. 69-70; Truman, App. 80; Eisenhower, App. 85-87; Kennedy, OM, App. 91-93; Johnson, App. 99-101). Those agreements, like Mr. Nixon's, permit the donor to decide what will be deposited (Hoover, App. 63; Truman, App. 73; Eisenhower, App. 84; Kennedy, App. 90; Johnson, App. 98). And those agreements, like Mr. Nixon's, provide for the removal from deposit of items which the donor or his designees may desire for personal use (Hoover, App. 69; Truman, App. 79; Kennedy, App. 90; Johnson, App. 101).

Despite the identical provisions designed to assure each of these Presidents, their families and staffs continued confidentiality even to the present day, Congress has focused solely on Mr. Nixon's agreement. In so doing, Congress ignored valuable historical material such as the tape recordings of President Kennedy's conversations that have not been donated to the gov-

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[57] This aspect of the law also renders it violative of the Bill of Attainder Clause. *See* pp. 130-141, *infra.*

ernment (App. 482-483), and those of President Johnson that he donated under a fifty year access restriction (App. 467). Congress' action in this regard is both constitutionally underinclusive and overinclusive. The aim of historical preservation, if legitimate, rationally applies equally to the papers of past, present and future Presidents, to Vice-Presidents and perhaps no less to legislative and judicial figures. This lack of precision in matching the terms of the Act to its objectives undermines congressional claims that there was a pressing need for this measure and renders it unconstitutional.

There is a simple and straightforward reason why the justifications now provided for this legislation do not match its specific terms: these interests are after-the-fact rationalizations for a law that was adopted principally in reaction to frenzied public opinion concerning the "Watergate affair." This conclusion emerges indisputably from an examination of the legislative history of the Act.

The Senate Committee on Government Operations that reported to the full Senate the portion of the law that is now challenged (*i.e.,* Title I), barely discussed —much less emphasized—the "important interests" which the court below discerned and which are now cited in support of the Act. Rather, the Senate Committee justified this Act as one designed to preserve "additional evidence" relating to "the 'Watergate affair,' as it is popularly known." S. Rep. No. 93-1181, 93d Cong. 2d Sess., p. 3. Fearing that certain tape recordings concerning that subject were "in imminent danger of destruction" (*id.* at 4), the Senate Committee viewed this legislation as dealing with a subject of "importance and urgency"—so much so that it pressed

the Congress "to act expeditiously" on the proposed bill and enact it without any hearings whatever. *Ibid.*

The conclusion of the Senate report, in full, reads as follows (*id.* at p. 6):

> The Committee concludes that legislation must be enacted promptly to protect and preserve the papers, documents, memorandums, tape recordings, and transcripts originating during the presidency of Richard M. Nixon in order that all facts about the Watergate affair may be made available to the American people and to the courts, prosecutors, and individuals involved in trials arising therefrom. S. 4016, as amended, will provide such adequate protection and preservation.

The House of Representatives added to the bill the sections that now appear as Title II.[58] The House report—unlike its Senate counterpart—did refer briefly to the "legitimate public interest in gaining appropriate access to materials of the Nixon Presidency which are of general historical significance." H. Rep. No. 1507, 93d Cong., 2d Sess., p. 2. It also described, as one of several shortcomings of the "Nixon-Sampson Agreement," its alleged disregard of "the needs of Congress and executive agencies for continued use of the documents in the process of government." *Id.* at 3. But the House report, in total, emphasized the Con-

[58] Neither House of Congress held hearings on the Act we challenge here. In two days of hearings on the Title II provisions, however, the House Committee learned that the issues relating to the subject of control of presidential materials are complex and involved philosophical questions of national policy. Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation, 93d Cong., 2d Sess.

gress' overriding absorption in the "Watergate affair," as manifested by its concluding observation regarding Title I (*id.* at 8):

> Clearly, it is in the public interest to preserve the materials and to provide access to the materials for judicial proceedings to expeditiously complete the prosecution of Watergate related crimes and to permit the just resolution of other adjudications requiring access to the materials. Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of "Watergate" and to provide a basis for legislation and executive action to prevent future "Watergates" and clearly it is in the public interest to safeguard the historical record of the Presidency during the last five and one-half years.

We direct this Court's attention to the disparity between the reasons expressed at the time of enactment, which motivated Congress to enact this legislation, and the grounds upon which it is defended in court more than two years later not because we are asking this Court to divine the true "motives of the legislators" or because our legal argument depends on which of the professed policies is viewed as the dominant one. Rather, we believe that it is important to emphasize that the Court does not have before it a fully considered and deliberate legislative judgment of how to preserve "Presidential Recordings and Materials," reached after plenary congressional consideration of relevant policies, likely consequences of particular bills, historical and constitutional analysis and due legislative debate. This case concerns, instead, a stopgap measure, devised in great haste by legislators who were witnessing a Nation preoccupied with the "Watergate affair"

and were, consequently, reflecting the popular passions engendered by that singular series of events. So long as this ill-considered legislation remains on the books it has a seriously damaging effect on the appellant. And so long as its presumed constitutionality remains unimpaired, any incumbent and future President must conduct his affairs in a manner that takes account of the possibility that his materials may ultimately be the subject of similar legislation.

A statute so broad and so sweeping—a law that cuts so deeply into the ability of a President to be master of the day-to-day operation of the office that the Constitution commits to him and that offends a panoply of other constitutional rights held by a President in common with every inhabitant of the land—should not be permitted to stand as a precedent for future legislation which might affect not merely the Chief Executive but other branches of government.

II

THE ACT VIOLATES THE BILL OF ATTAINDER CLAUSE BECAUSE IT INCORPORATES A LEGISLATIVE JUDGMENT OF INDIVIDUAL BLAMEWORTHINESS RATHER THAN ESTABLISHING A RULE OF GENERAL APPLICABILITY

Earlier in this brief we discussed the fact that Title I of the Act is limited, by its express terms, to the Presidency of Richard Nixon. It sequesters the papers and other materials of only his administration, leaving those of his predecessors and successors to the customary practice that has always been followed and to the conditions imposed by the individuals who occupied the presidential office. Similarly, the Act selects only the papers of the President.[59] Although other govern-

[59] A recent opinion by the former Legal Adviser of the Department of State to Henry A. Kissinger, formerly Secretary of State, advised Mr. Kissinger that stenographic records of his telephone conversations were "personal papers" which Mr. Kissinger could retain on leaving office. The Legal Adviser noted that the Presidential Recordings and Materials Preservation Act did not apply because the statute, "on its face applies to 'the Presidential historical materials of Richard M. Nixon' and not to personal papers of individuals who served under him." Memorandum to the Secretary from the Legal Adviser, November 11, 1976, p. 4.

ment officials are alleged to have been involved in one form or another in the subject generally known as the "Watergate affair" and in the "abuses of governmental power" which Section 104(a)(1) purports to cover, the Act does not reach the material maintained by any other public official.

Why was Mr. Nixon selected for this singular treatment? The court below had no difficulty observing, at various instances throughout its opinion, that the Congress could reasonably have concluded " . . . that there was misconduct on the part of Mr. Nixon and his close associates" (J.S. App. 47a). This premise was phrased differently at different places:

> [1] . . . Congress had before it an adequate basis for concluding that responsible processing of the materials in accordance with important public interests could be better ensured if the materials were entrusted to government archivists (J.S. App. 48a).
>
> [2] . . . To begin with, Congress might legitimately have entertained doubts about whether Mr. Nixon would not violate such a prohibition (J.S. App. 48a n. 35).
>
> [3] . . . Congress had before it an adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue. This aspect of the case provides a basis for distinguishing him from other Presidents, whose incli-

> nation to serve important public interests in disposing of such materials Congress had less reason to question (J.S. App. 96a).

The "misconduct" or "unreliable custodian" proposition pervaded the reports and the legislative debate on the bill.[60] Senator Ervin was the Senate floor manager of the bill, and his repeated references to the endless hours of testimony on "Watergate" had only a single implication: Mr. Nixon was, in some way, blameworthy, and he personally could not be trusted to dispose properly of the tape recordings of his conversations, of his internal memoranda, and of all other materials of his Presidency. This factor, as the district court noted, is what distinguished him, in Congress' mind, from "other Presidents." If not for that one

[60] *E.g.*, S. Rep. No. 1181, 93d Cong., 2d Sess. 4 (1974) ("The net effect of these provisions [of the depository agreement] is to place the tape recordings in imminent danger of destruction. . . . Moreover, the agreement suggests that Mr. Nixon, or his designee, could start destroying all the papers and materials (other than the tapes) by 1977. The ultimate destruction of the tapes, coupled with the difficulties in obtaining access to the other Nixon materials, would be a fundamental violation of public policy."); H.R. Rep. No. 1507, 93d Cong., 2d Sess. 3 (1974) ("This arrangement would permit Mr. Nixon to remove and destroy any of the documents if he wishes to do so. . . . By allowing Mr. Nixon to destroy all of the materials, the agreement ignores the public interest in preserving them.") Both reports cited the fact that high-ranking officials in the Nixon administration had been charged with federal offenses growing out of the "Watergate affair." S. Rep. No. 1181, *supra* at 3; H.R. Rep. No. 1507, *supra* at 2. Senator Ervin explained that the bill seized all material beginning with Mr. Nixon's inauguration "because it was the period for which he accepted the pardon for all crimes he had committed or may have committed against the United States." 120 Cong. Rec. 18320 (1974). He explained that "[a]ll that the committee bill is designed to do is to protect for future use in the Courts of the tapes and other documents which evidence criminal acts" (*id.*).

element, it is plain that there would be no conceivable rational basis for enacting a law that seizes only his papers, subjects only his documents and recordings to intensive screening, and places only on him the burden of securing restrictions on papers that contain confidential material.[61]

We submit that this legislative premise of individual culpability—even if phrased, as the court below phrased it, in terms such as "Congress had before it an adequate basis" or "Congress might legitimately have entertained doubts"—is precisely what the Bill of Attainder Clause prohibits. Congress may not enact a statute that applies to a single individual and subjects him or her to treatment different or worse than others receive, entirely on the basis of a *legislative judgment* of blameworthiness. Under our system of

[61] Senator Ribicoff commented on this obvious unfairness in an exchange with the Administrator during hearings on implementation of the law.

> Mr. Sampson: . . . Under this particular Act, we are changing the ground rules drastically—very, very drastically in this case. That power [to protect confidentiality or privacy] no longer resides with President Nixon as it did with prior Presidents. . . .
>
> Senator Ribicoff: And all succeeding Presidents?
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> Mr. Sampson: This Act pertains only to President Nixon.
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> Senator Ribicoff: Do not we have a problem here? You know, President Nixon was a President who had troubles. To me there is a sense of unfairness just to have a proceeding that applies to one of the Presidents.
>
> If these papers belong to the public domain, should not we be passing a law that applies to future Presidents? I feel uneasy singling out one President to be treated differently than any President in the past or for any President in the future . . .

Hearings on Implementing P.L. 93-526 Before Senate Comm. on Government Operations, 94th Cong., 1st Sess. 15-16 (1975) (transcript).

government, individualized appraisals of guilt or innocence are the job of courts or other adjudicative bodies; legislatures are not equipped for such tasks, and the legislative process incorporates none of the protections that enable affected individuals to defend against such findings.

This was the teaching of this Court's most recent bill of attainder decision. In *United States* v. *Brown,* 381 U.S. 437 (1965), this Court provided an extensive discussion of the rationale behind the Bill of Attainder Clause contained in Article I, Section 9, clause 3 of the Constitution. It said (381 U.S. at 442):

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

The Court went on to note that legislatures "feel all the passions which actuate a multitude" and to quote Alexander Hamilton's warning that "[n]othing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature . . .". 381 U.S. at 444.

Against this background, said the Court, the Bill of Attainder Clause "reflected the Framers' belief that

the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." 381 U.S. at 445. The dangers of legislative trials were those specified by Professor Cooley in his treatise on Constitutional Law—that legislatures are "peculiarly susceptible to public clamor . . ." and are unable to try an accusation impartially, "especially in those cases in which the popular feeling is strongly excited . . . ." 381 U.S. at 445 *citing* 1 Cooley, Constitutional Limitations 536-537 (8th ed. 1927).

Accordingly, the Court concluded that the ban on bills of attainder was an effort "to guard against such dangers *by limiting legislatures to the task of rule-making.*" 381 U.S. at 446 (emphasis added). The Court then quoted from the classic case of *Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87, 136 (1810):

> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.

The statute involved in the *Brown* case was one which declared that any member of the Communist Party was ineligible, for a period of five years after termination of his membership, to serve as an officer or employee of a labor union. The Court held that this constituted a bill of attainder—"legislative punishment, of any form or severity, of specifically designated persons or groups." 381 U.S. at 447. The Court said that Congress undoubtedly had the power "to enact legislation designed to keep from positions affecting interstate commerce persons who may use such positions to

bring about political strikes." 381 U.S. at 449-450. The statute in *Brown,* however, was not framed in "rule-making" terms (381 U.S. at 450):

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.

In a later footnote in its *Brown* opinion, the Court summarized "[t]he command of the Bill of Attainder Clause" as follows (381 U.S. at 454 n. 29):

> . . . that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics . . .

And at the conclusion of its decision, the Court restated the general principle (381 U.S. at 461):

> . . . Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied.

There is no way, we submit, that Title I of the Act can be squared with these constitutional principles. If Congress was concerned here with the question whether

Mr. Nixon was " a wholly reliable custodian" of his presidential papers, if it entertained doubts as to whether he would "violate a prohibition" against destruction of documents, if it believed that there had been "misconduct on the part of Mr. Nixon and his associates," Congress was obliged to enact a statute of general applicability that would leave to judicial determination the question whether he "possesses those characteristics." In a judicial proceeding under a statute establishing a general standard, Mr. Nixon would have had the opportunity to be represented by counsel, to cross-examine witnesses, to present evidence on his own behalf, and to submit arguments on the law and the facts. In the legislative process that led to this statute—precisely because of "public clamor" and in an atmosphere where "the popular feeling is strongly excited"—there was no such opportunity.

It would have been easy for Congress to enact a law that would not have violated the Bill of Attainder Clause and would have reserved to Mr. Nixon the rights that that clause was designed to secure. If Congress had provided that the Attorney General or the Administrator of General Services could institute a civil suit in an appropriate federal court to enjoin disposition (or even to transfer custody) of presidential historical materials (or any other important historical records) by any person who could be shown to be an "unreliable custodian" or who had "engaged in misconduct" or who "would violate a criminal prohibition," the statute would have left to judicial determination, after a fair proceeding, the factual allegations regarding Mr. Nixon's blameworthiness. Power to issue restraining orders and temporary injunctions would have given such a law the same immediate effect that the 1974 Act had.

But Congress did not leave the judicial function to an Article III court, as the Bill of Attainder Clause and the separation of powers principle require. Instead, it engaged in a classic "trial by legislature." It determined that Richard Nixon could not be trusted to dispose properly of his materials, and it named him in its legislation.[62]

This Court noted in the *Brown* case that the law at issue there did "not contain the words 'Archie Brown' . . ." 381 U.S. at 461. Yet it determined that the identification of the Communist Party as a group turned the statute into a bill of attainder because Congress is not constitutionally permitted to engage "in specification rather than rule-making." 381 U.S. at 454. Obviously, if the Congress that enacted the provision of the Landrum-Griffin Act that was in issue in *Brown* had heard testimony regarding Archie Brown and had determined, from such testimony, that Archie Brown was too unreliable to serve as a union officer and too likely to

[62] A perceptive Comment on the *Brown* decision appears at 54 Calif. L. Rev. 212 (1966). It demonstrates the validity of the Court's analysis that the Bill of Attainder Clause was designed to keep the legislature from exercising judicial functions. The Comment identifies "specificity" as one element of a bill of attainder, and observes that "specificity in its classic sense is present in a statute when the legislature has identified by name the person or persons who will be subject to the statute's sanctions." 54 Calif. L. Rev. at 235. After analyzing the "punishment" element (which it describes as "the most fertile source of confusion" *id.* at 238), it concludes that "[t]he proper approach is to determine whether the challenged statute imposes a deprivation typically associated with bills of attainder"—included among these are "exclusion from a job or profession, banishment and *confiscation of property*" (*id.* at 242; emphasis added). The third element—often overlooked—is the absence of a judicial trial, because it is the "procedural safeguards" of such a trial that are imperative.

call political strikes if he occupied such a post, it could not enact a law disqualifying him personally, by name, from union service. The appellant in this case is not entitled to less in the way of constitutional rights because he served the country as President for 5½ years, no matter what the "passions which actuate a multitude" may have been in 1974 or may be today. By singling him out for this legislative disability, Congress violated the Bill of Attainder Clause.

The district court asserted that the Bill of Attainder Clause was not violated because there was no "punitive motivation" and no "punitive intent or character" in the statute (J.S. App. 98a-99a). Again the district court ignored the *Brown* case—the most recent authoritative pronouncement on the subject. This Court said in *Brown* that punitive intent—in the form of retribution—was *not* an essential element of a bill of attainder. It concluded that the Bill of Attainder Clause would be violated even if the statute "were enacted for preventive purposes." 381 U.S. at 458. The legislative fear "that a given person or group was likely to cause trouble" and should be subject to deprivations "in order to keep it from bringing about the feared event" (381 U.S. at 458-459) was said to be the objective of "a number of English bills of attainder."

Even if Congress' desire here was to effectuate "a preventive, not a vindictive policy" (381 U.S. at 459, quoting from 3 Hamilton, History of the Republic of the United States 25 (1859)), it could not do so by specifying Mr. Nixon by name. This Court in *Brown* noted that the congressional purpose in *United States* v. *Lovett,* 328 U.S. 303 (1946), an earlier bill of attainder decision, was to remove from government serv-

ice those whose "continued employment [was] dangerous to the national welfare." 381 U.S. at 460. This preventive purpose sufficed to make the challenged law a bill of attainder.[63]

Nothing could be more clear than that Congress was seeking to remove Mr. Nixon from authority over his presidential papers because it feared that if he had the authority that other Presidents possessed, documents or recordings might be destroyed. This preventive purpose is identical in kind to the legislative purposes in *Brown* and *Lovett,* and it follows from those cases that the Act is invalid.

Finally, it must be noted that the immediate harm to Mr. Nixon is more than superficially punitive. He has been deprived for more than two years of ready access to and control over the most personal materials of the years when he occupied the highest office in the nation. He has had taken from him the entire record of this period of his life, and he has been told that they will be examined, word-by-word, by dozens of persons whom he does not know and has no reason to trust.

The disability imposed on Archie Brown by the law found to have been a bill of attainder in the *Brown* case was, by comparison, less of a hardship than what this Act has inflicted on Mr. Nixon. What was done here to Mr. Nixon is clearly "confiscation of property"—a traditional punishment associated with bills of attainder. Even if "just compensation" is offered

[63] The majority of the Court in *Lovett* rejected Mr. Justice Frankfurter's suggestion that a bill of attainder could be identified by the fact that it constituted retribution for past acts, which had to be accompanied by a legislative intent to punish. 328 U.S. at 324-325.

or paid,[64] the property of the former President has plainly been taken. This the Constitution simply does not allow.

III

THE ACT VIOLATES MR. NIXON'S CONSTITUTIONAL RIGHT OF PRIVACY AND HIS LIBERTY OF POLITICAL EXPRESSION AND ASSOCIATION

We turn now to the effects of this law on the fundamental rights Mr. Nixon shares with every inhabitant of this land—rights of expression and privacy protected by the First and Fourth Amendments. By voluntary entry into public life an elected official surrenders certain privacies that are secured by law for those who elect not to place themselves in the public spotlight. *E.g., New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). But this does not mean that a public figure—or even the most public of all figures (such as the individual serving as President)—is stripped of all legal protection for his privacy. In their seminal discussion, which underlies the development of privacy law over the past three-quarters of a century, Brandeis and

[64] The only case of which we are aware that deals with governmental taking of a person's papers under the power of eminent domain is *Porter* v. *United States,* 473 F.2d 1329 (5th Cir. 1973), wherein Lee Harvey Oswald's widow sued for compensation for articles seized in the investigation of President Kennedy's assassination. The articles included a diary and some letters of Oswald. 473 F.2d 1331-32. The taking in *Porter* is completely dissimilar to the taking here. The items had already been *legally* seized by officers immediately following the assassination, and thus Mrs. Oswald had not been deprived of the rights and of expectations which Mr. Nixon here asserts. Moreover, as the district court indicated, there was no challenge to the right of the United States to condemn the property. It was a suit strictly for compensation. 335 F. Supp. 498, 500 (N.D. Texas 1971).

Warren recognized that protection need not be granted "to whatever degree and in whatever connection a man's life has ceased to be private . . ." but even as to public figures, they cautioned that a shield for privacy is warranted for matters that "have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity." Brandeis & Warren, *The Right to Privacy,* 4 Harv. L. Rev. 193, 215-216 (1890).

This Act effects a wholesale invasion of Mr. Nixon's privacy rights for the entire period he served as President. It also offends his rights under the First Amendment by intruding on conversations and communications that constitute political expression and association not related to the business of government. The Act has these drastic effects because the President—unlike other high civilian officials of the United States—is totally enveloped by the living conditions that the position necessarily imposes on its occupant. A President's personal security is among the highest priorities of various federal agencies; he and his family are expected to live where he works and to be available at all hours of the day and night. Moreover, he functions throughout his Presidency in the dual capacities as political head of his party and as President. It is, therefore, extraordinarily difficult for a President effectively to separate his private life from his official work.

In this case the difficulty has been heightened because this statute was enacted after the fact—*i.e.,* after the termination of Mr. Nixon's Presidency. The Act is not prospective in operation. It gave Mr. Nixon no opportunity to take the steps suggested by the district court "to prevent commingling, to prevent retention of some materials, or to take other steps to protect his

privacy" (J. S. App. 71a-72a). Indeed, the district court held that the consistent practice of "de facto control of presidential materials by former Presidents" gave rise to a "reasonable expectation of privacy" on Mr. Nixon's part (J. S. App. 74a n. 55). It is with these two considerations in mind—the all-pervasive obligations of the office and the absence of any advance warning—that appellant's Fourth and First Amendment claims must be evaluated.

A. The Seizure and Examination of All Mr. Nixon's Materials, Including His Most Private Communications, Unreasonably Invades His Constitutional Right of Privacy.

The Act operates to seize every tape recording produced in Mr. Nixon's various offices and residence quarters while he was President and all other items of any description which constitute "Presidential historical materials" (Sec. 101(a),(b) (pp. 33-34, *supra*)). Without mandating the return of "personal" materials, the Act directs the Administrator "to take into account" the need to return to the former President's sole custody "tape recordings and other materials which are not likely to be related to [informing the public of 'Watergate'] *and* are not otherwise of general historical significance" (Sec. 104(a)(7) (emphasis added)). The impracticality of accommodating that need is reflected by the Administrator's proposed regulation which—in defining "private or personal materials" as those "relating solely to a person's family or other nonpublic activities and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff" (Proposed Reg. § 105-63.104(b)), —provides that private or personal materials will be retained by the government if they are intermixed with histori-

cal materials in one document or tape. GSA Legal Explanation of Public Access Regulations [under P.L. 93-526] G-4 (1975).

What is the extent of this statute's intrusion on Mr. Nixon's private life? His testimony reveals the intimacy of the materials that have been seized (App. 175-76):

> . . . Because of the long hours that I was required to spend away from my family while President and even before that as Vice President, Senator and Congressman, my daughters adopted the practice of leaving personal notes at my office or in my residence so that at the end of the day, if they were not around, I would have at least a moment or two to learn what they had been doing or what their feelings or reactions were to my own activities. I valued, and still do, all of these very private and highly personal thoughts and deliberately preserved them among my presidential materials.
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> . . . As a private citizen, I engaged in correspondence with friends, associates and other individuals . . . . For example, I can recall correspondence between myself and law school friends concerning our class reunion. I can also recall some personal letters I wrote to families of young men killed in action in Vietnam. These letters, of course, were of little import to the nation or to anyone except myself and the recipient. Often, such personal letters were written in my own hand . . . . On one occasion I recall writing Mr. E. Guy Warren concerning an unpopular but important stand he had taken on a controversial subject. On another occasion I corresponded with members of my law practice concerning the circumstances under which my membership in the firm should be terminated. Other personal letters were sent to such persons as Mrs. Earl Warren, General J. D. Hughes, Elmer Bobst, Mrs. Lyndon Johnson, Patrick J. Buchanan, William Rogers, Mrs. Alice Roosevelt Longworth, Mrs. Bernard Brennan, Leonard Garment, and then Congressman Gerald R. Ford.

Such materials are in addition to the thousands of hours of conversations described earlier (pp. 21-25, *supra*) among the former President and his family, physician, clergy, attorneys and numbers of personal friends with whom he met during nearly a three-year period. But perhaps the most flagrant aspect of the Act's privacy invasion is the seizure and review by government employees of the former President's oral diaries in which he expressed his frustrations, feelings of exhilaration and other emotions experienced throughout the day (App. 178).[65]

The appellees stress that all of Mr. Nixon's private materials will be returned to him, which we have shown is not likely the case because of the physical properties of the tapes and papers. Nevertheless, even if some or all of such highly personal items were ultimately returned, the fact remains that government personnel will have irreparably invaded the former President's privacy. The screening and review process itself is what offends Mr. Nixon's right to keep private subjects private. The screening process to be applied to the tapes and materials involves no less than three levels of review of any materials that are to be returned to Mr. Nixon as "private" and "not of historical value." To suggest that such an intrusion will

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[65] As noted earlier, the former President's oral diaries are among the confiscated material in the form of unlabeled dictabelts and as simultaneously recorded on the voice-activated tape recordings (p. 22, *supra*).

be undertaken "professionally" or "discreetly" ignores the realities of the situation and the fact that privacy protection goes to the offensiveness of having one's personal effects unwillingly exposed to outsiders. The thought of having strangers listen to years of private conversations with one's wife and family would be horribly offensive to any person. Yet, under this Act, government employees will, at some point, find themselves listening to conversations between Mr. Nixon and his daughter prior to her wedding—conversations which all would agree are of the most intimate nature, with expressions by father and daughter of hopes, joys, fears, and sadness.

The right of privacy that precludes such an invasion is a well recognized and firmly established liberty secured by the Fourth Amendment and by the historical events that led to its adoption. The celebrated opinion in *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765), observed (emphasis added):

> Papers are the owners goods and chattels; *they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection;* and though the eye cannot by the law of England be guilty of a trespass, yet, *when private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass,* and demand more considerable dangers in that respect.

Mr. Justice Brandeis, in his classic dissent in *Olmstead* v. *United States,* 277 U.S. 438 (1928), spoke even more eloquently of "the right to be let alone," describing it as "the right most valued by civilized men." He described the objective of the Framers of the Bill of Rights with regard to privacy (277 U.S. at 478):

> They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

The Fourth Amendment flatly prohibits the kind of governmental intrusion upon personal privacy envisioned by this Act. That ban, which has stood fast even against assertions of grave urgency, surely should not be waived simply in order to secure what Congress believes to be a more complete historical record.

1. *The Act authorizes a "general search"*

One of the core principles embodied in the Fourth Amendment is the prohibition against general warrants, which were described in *Stanford* v. *Texas,* 379 U.S. 476, 481-484 (1965), as "blanket authority" for government officials "to search where they pleased" for contraband or other material subject to seizure. A general search, not limited by any restriction on "the things to be seized," enables government agents to look first, and determine only later what it is they are seeking.

The same evils that led to the constitutional condemnation of general warrants are present in this Act. The Act removes from Mr. Nixon's custody all papers and other materials collected over a five year period and directs government officials to review all these materials and decide, on the basis of that review, which fall outside the various "interests" Congress is said to have been implementing.[66] This sequence re-

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[66] Among Congress' explicit interests, of course, was evidence of alleged crimes. Senator Ervin explained this purpose twice during his presentation on the floor of the Senate.

> What we are after is the exercise of first amendment rights

verses the proper constitutional process. Even when the governmental interest at stake is the rule of law—*i.e.*, the investigation and apprehension of those who commit criminal offenses—search warrants and subpoenas may be executed only for specific documents or objects. Rummaging through all of an individual's belongings or through all his records in order to find which, if any, should be subject to seizure is an invitation to precisely the abuse that the Fourth Amendment was intended to prevent.

In *Kremen* v. *United States,* 353 U.S. 346, 347-48 (1957), for example, a search of two fugitives incident to their arrest was rendered invalid by the wholesale seizure of the entire contents of the house in which they were found. This Court reproduced as an appendix to its opinion the inventory of the items seized, suggesting that this procedure of seizing first and determining later which items might be properly kept was an impermissible one. Judge Learned Hand made the same point succinctly in *United States* v. *Poller,* 43 F.2d 911, 914 (2d Cir. 1930), when he said that "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of man's privacy which consists of rummaging about among his effects to secure evidence against him."

The evil of such an uncontrolled search is aggravated when the material being "searched" is a written or recorded statement by the individual subjected to

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in connection with criminal conspiracies. [120 Cong. Rec. 18320 (1974)]

The only papers that would be taken from Mr. Nixon under it would be evidence relating to the criminal acts known as the Watergate Affair, that is all—plus documents of great historic value. [120 Cong. Rec. 18321 (1974)]

the search. As Judge Friendly observed in *United States* v. *Bennett,* 409 F.2d 888, 897 (2d Cir. 1969):

> The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries.

In administering the present Act the entire range of Mr. Nixon's personal conversations and communications must be read by government officials in order to discover which will be retained, which will be publicly disclosed, and which will be returned. If Congress had directed that materials not of "general historical significance" be returned to Mr. Nixon without any prior review by government employees, the invasion of Mr. Nixon's privacy would have been somewhat reduced. But the question would still remain as to where the line is to be drawn—an intractable issue. Do conversations that Mr. Nixon had with close friends, his wife or family, in which he related his personal worries or frustrations about the Middle East crisis or his satisfaction and excitement about the thawing of relations with China bear a "connection with his constitutional or statutory duties or political activities as President," even though he sought no official advice from these persons? Do thoughts about such topics retained by him on dictabelt diaries have a "connection with his constitutional or statutory duties or political activities as President," even though he considered these thoughts "exceedingly private?" As the Administrator himself acknowledged:

> From the practical point of view, the process of distinguishing, in day-to-day filing operations, between official documents and documents of a personal or political character is extremely difficult.

> Of course, it is easy to decide that the President's letters to his relatives are personal and that the promotion lists for the Armed Services are official, but in the vast area between two extremes, difficulties arise. [D. Lloyd, *The American Archivist,* quoted in GSA Report To Congress on the Implementation of P.L. 93-526, at B-1—B-2]

If there is a question as to whether a particular conversation should be returned as personal or should be disclosed in the interest of "accurate history," we submit that the constitutional quality of the right of privacy outweighs the generalized and less critical interest in history that finds no constitutional basis. Consequently, the former President is the only individual who may waive the privacy right and make the choice to disclose what was said.

The Act, however, does not provide Mr. Nixon the opportunity to segregate his own "private" materials under *any* definition of that term. Rather, it establishes a procedure which subjects all of his materials —official, personal, and political—to the review of no less than three groups of archivists. In order to fulfill the Act's mandate concerning disclosure of "Watergate" information "at the earliest reasonable date," the Administrator states that the first tier alone will require approximately one hundred government employees.[67] Accordingly, Mr. Nixon's most private thoughts and communications, both written and spoken, will be exposed to and reviewed by a host of persons whom he does not know and did not select, and in

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[67] *Hearings on GSA Regulations to Implement P.L. 93-526 Before Senate Comm. on Government Operations,* 93rd Cong., 1st Sess. 7 (1975) (transcript).

whom he has no reason to place his confidence.[68] This group will decide what is personal, to be returned to Mr. Nixon, and what is historical, to be opened for public review.

There is simply no precedent for such a wholesale seizure of and search through an individual's papers. Even in the civil subpoena process, the party subpoenaed has the right to object to overbreadth of the subpoena and to deliver, *after his own review,* only those documents "relevant in purpose" to the inquiry. *See See* v. *City of Seattle,* 387 U.S. 541, 544 (1967); *In re Horowitz,* 482 F.2d 72, 78 (2d Cir.), *cert. denied,* 414 U.S. 867 (1973). And in criminal cases, the warrant must "particularly describe the 'things to be seized,'" *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965). Any disputed documents must be reviewed by an impartial judicial officer upon motion, not by an executive branch employee simply on request. None of these protections is afforded Mr. Nixon.

To be sure, the "general search" procedure contemplated by the Act is one that would more assuredly bring to the government—and possibly to public disclosure—all documents that could conceivably be of interest to it. To that end prosecutors who serve grand jury subpoenas or who secure search warrants would doubtless be happier if such process could be executed in the broadest possible terms, enabling them to review the material submitted or seized and then to determine what they would like to keep. The procedure estab-

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[68] This is in contrast to the practice of all prior Presidents who, in donating materials to Presidential libraries, have been able to pre-screen the materials to be deposited and to participate in the selection of persons who would review the materials for classification purposes (App. 65-67; 75-80; 84-88; 90-93; 98-103).

lished by this Act is comparable to a subpoena that directs a corporate officer to bring to an administrative agency all records of any kind in his possession whether or not they relate to the corporation's business. The agency clearly could not justify the issuance of such an overbroad subpoena on the theory that it—rather than the officer, whose self-interest may affect his judgment—must decide which documents relate to the conduct of corporate business. The risk that some documents may not be produced in response to a proper subpoena (enforceable, of course, by contempt or other penalty) is outweighed by the grossness of the invasion of privacy that accompanies the general search.

The district court tried unsuccessfully to distinguish the general warrant principle and *Stanford* v. *Texas* in footnote 63 of its opinion (J.S. App. 87a-88a). Its assertion, for example, that the search in *Stanford* was "enormously overbroad, encompassing material whose seizure was plainly unrelated to any legitimate government objectives" is not supported by the *Stanford* opinion. The legislation being enforced in that case was directed to the books and pamphlets which was "most of the material" seized. 379 U.S. at 479. In addition, of course, "files of . . . personal correspondence" were taken (379 U.S. at 480)—precisely what is at issue here. Nor does the *Stanford* opinion support the district court's claim that the intrusion into all of Stanford's personal papers maintained in his private home was conducted "in the hopes of finding a few pieces of incriminating evidence" (J.S. App. 88a n. 63). Stanford was, apparently, in the "mail order book business under the trade name 'All Points of View' " (379 U.S. at 479), and the object of the search

was to seize books that were said to violate the Texas Suppression Act in that they constituted "pro-Communist material." Hence the "300 separate titles" seized in the raid—which comprised the overwhelming bulk of the seized material—were, in fact, the intended objects of the search, not as the district court described it, randomly discovered "pieces of incriminating evidence."

The district court's assertion that the searchers in *Stanford* failed "to minimize the intrusion" also is unsupported by the opinion, which provides no description of what rooms were searched, whether the documents in portions of the house unrelated to the business were examined, or how the search was conducted. Beyond that, however, this Act also provides no evidence of any effort by Congress "to minimize the intrusion." The possibility that the Administrator, under repeated judicial urging, may take some voluntary ameliorative measures in the actual implementation does not rescue the law that Congress enacted.

Finally, the last two distinctions relied on by the district court are wholly unsupportable. First, it suggested that *Stanford* is different because it involved enforcement of criminal laws. If the court below meant to imply that there is *less* of a governmental interest in invading privacy when criminal laws are being enforced than when "historical accuracy" is the government's objective, the proposition is a startling one. Indeed, in *United States* v. *Nixon,* 418 U.S. 683 (1974), this Court's implication was squarely to the contrary. It appears from that decision that the enforcement of criminal laws by proper investigation could outweigh presidential privilege, whereas a generalized

interest in informing the public or legislating (*see, e.g., Senate Select Committee On Presidential Campaign Activities* v. *Nixon,* 498 F.2d 725 (D.C. Cir. 1974)) would not. The Fourth Amendment, by the terms of its own Warrant Clause, recognizes law enforcement as a permissible ground for intrusion on privacy, but has no comparable exception for "historical accuracy" or for the "availability of documents for successive administrations." And the district court's concluding suggestion that "government investigation or prosecution of suspected Communists" was "not an admirable spectacle" and, therefore, grounds for invalidating the search may reflect the personal view of the district court but finds no support in the *Stanford* opinion. It would, we believe, be an equally less than admirable spectacle if any court were to sustain this Act because its subject is Richard Nixon and not the "suspected Communists" involved in the *Stanford case.*

2. *The seizure of private materials is not justified by any compelling governmental interest*

The right of privacy guaranteed by the Fourth Amendment is not, of course, absolute. *See Roe* v. *Wade,* 410 U.S. 113, 153-154 (1973). It is clear, however, that the Act's incursion into this fundamental right "may be justified only by a compelling state interest," and that the Act "must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155. Even though the right of privacy is not expressly mentioned in the Constitution, this Court has recognized its status among the basic fundamental rights of the individual. *See Griswold* v. *Connecticut,* 381 U.S. 479 (1965). This should be particularly true in this case where the legislation invades a man's papers,

"the dearest property a man can have." *Entick* v. *Carrington,* 95 Eng. Rep. 807 (1765).

No interest other than congressional distrust of Mr. Nixon or its desire to obtain all information about his private political thoughts and actions justifies the refusal to permit him to be the judge of those materials that are private. The district court did not supply any reason for the refusal to leave this task with the former President; it viewed the problem as one presented by "the mingling of personal and private documents and conversations in the midst of a vastly greater number of non-private documents and materials related to government objectives" (J.S. App. 87a) and assumed that someone other than the former President had to make the judgments separating the private from the non-private.

Distrust of Mr. Nixon's selection criteria is no more permissible, as a legislative judgment, in this area than it is with regard to our bill of attainder claim (see pp. 130-141, *supra*). In light of the expectation that he would be able, at some future date, to sort out his private materials, and in light of the consistent practice of prior Presidents, it is unfair and unreasonable now to deny him that right. Indeed, as we have noted, even when criminal investigations are involved, the sorting process is done by the person upon whom the subpoena is served; the prosecutor must ordinarily be satisfied with the witness' sworn testimony that he has produced whatever is called for.

3. *The wiretapping analogy is erroneous*

The district court justified the Act's admitted intrusion on privacy rights by relying on an analogy to Title III of the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. 2510-2520 (1970), which has universally been held constitutional. It asserted that here, as with wiretapping, the problem is segregating conversations in which there is a legitimate interest from those which are entirely private. According to the district court, since Title III permits "intrusions into communications that may be both unconnected to legitimate government objectives and intensely private" (J.S. App. 80a), this Act may constitutionally authorize similar intrusions. But the analogy fails for several reasons.

First, electronic surveillance depends, almost by definition, on the subject's ignorance of the existence of the surveliance. There is no way that a wiretapping operation could succeed if the subject were told to advise the eavesdropper whenever his conversation was to be a private one. On the other hand, as we have indicated above, Mr. Nixon might well have been given the task—which all his predecessors assumed—of separating the personal and political from the official. Indeed, the district court observed that a law which was entirely prospective would present no problem because a President might then, while in office, segregate his private materials from official documents or choose not to retain personal notes. But, of course, if distrust of a President's presumed inherent bias—noted by the district court as a reason for third party screening—lies beneath such a statute, deliberate misclassification could not be prevented as to future Presidents except by insisting in every instance on review of *all* their outgoing files—both personal and official. There is, we submit, a major difference, therefore, between the surveillance undertaken of a suspected criminal and the effort made by Congress to oversee the sorting criteria applied by a President.

Second, the electronic surveillance procedure has been carefully designed to meet constitutional standards. In *Berger* v. *New York,* 388 U.S. 41 (1967), this Court invalidated a New York wiretapping and eavesdropping statute on its face because the statute—which required prior judicial authorization for the taps—failed to spell out "precise and discriminate" requirements the Court held required under the Fourth Amendment as a precondition to any governmental intrusion into constitutionally protected private communications. These requirements included: (1) a prior judicial authorization, (2) specification of a particular criminal offense said to justify the intrusion, (3) specification "with particularity" of the conversations sought to be seized, (4) minimization of the duration of the wiretap, (5) termination once the conversation sought is seized, and (6) a showing of *exigent* circumstances justifying use of the wiretapping form of search and seizure. In the absence of these "precise and discriminate" requirements, the *Berger* court held that a state statute authorizing wiretapping was on its face invalid as authorizing the precise equivalent of the "general warrant" condemned by the Fourth Amendment—even though the searching officer's discretion in that case was checked at least by prior judicial authorization.

Title III of the Omnibus Act was drafted to meet the standards of *Berger* v. *New York* and to conform with *Katz* v. *United States,* 389 U.S. 347 (1967). The Congress took explicit note of each of the above enumerated "precise and discriminate" limitations on the wiretapping powers spelled out in *Berger,* and accordingly constructed the federal wiretapping statute around these limitations because the Fourth Amendment demanded no less.

In contrast to the Omnibus Act, the Act here authorizes acquisition of the contents of more than five years of the former President's past conversations and documents by a scheme which dispenses with every one of the "precise and discriminate" criteria spelled out in Title III to conform with the requirements of the Fourth Amendments. For example, among the "precise and discriminate" standards *Berger* demands as a precondition to constitutional wiretapping is the rejection of New York's "evidence of crime" formulation in favor of a "belief that a particular offense has been or is being committed. . . ." In this Act, no such specificity exists. Rather, privacy is invaded "under the rubric of preservation of an accurate and complete historical record" (J.S. App. 48a-49a). It is hard to conceive of a broader and less discriminating standard for governmental invasion of personal rights.

Nor—contrary to the district court's assertion—does the instant statutory scheme "parallel" to any degree Title III's limitation of wiretapping to cases when "normal investigative procedures have failed or would be likely to do so" (18 U.S.C. 2518(3)(c). Indeed, the precise opposite of this assertion is more accurate. There is no reason why "normal investigative procedures"—such as a request to appellant or his counsel to produce properly described categories of materials, or judicially authorized subpoenas or search warrants —would not have fully served any legitimate governmental interest while eliminating any need to invade materials acknowledged by the court below to be beyond the scope of permissible governmental intrusion. Nothing substantiates any claim that recourse to unilateral governmental seizure and involuntary examination of the materials in issue was necessary to prevent destruction.[69]

The district court's concession that the Act does not, in its statutory provisions, require "minimization" of the intrusion (J.S. App. 81a) demonstrates that this "precise and discriminate" standard is also lacking. In fact, the hearings held on the Administrator's proposed regulations indicate that, even to the slight extent that the Administrator is seeking voluntarily to reduce invasions of privacy, he is rebuffed by the Congress. *See, e.g., Hearings on GSA Regulations to Implement P.L. 93-526 Before the Senate Comm. on Government Operations,* 93d Cong., 1st Sess. (1975) (remarks of Senator Nelson).[70]

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[69] Under the depository agreement (J.S. App. 134a-138a) the government was guaranteed that *nothing* would be destroyed for three years. Under this agreement, Mr. Nixon, unlike his predecessors, gave the government joint control over every single document and tape recording contained in the presidential materials, even denying himself *access* without the presence of the Administrator or his delegate (who would hold a key necessary for access) and barring himself from removing any materials for three years. The tape recordings under the agreement could not be destroyed for at least five years.

[70] The district court's other analogy (J.S. App. 79a-80a n. 57) is equally unsound. The ALI Model Code of Pre-Arraignment Procedure (1975) also sets "precise and discriminate" limitations. For example, section 220.5(1) at the outset commands the officer who is to execute the search warrant (emphasis added) "[to] endeavor by all appropriate means to search for and identify the documents to be seized *without examining the contents of documents not covered by the warrant.*" Included among those "appropriate means" is a request to the target of the search warrant that he screen the materials prior to seizure (section 220.5, note).

Indeed, section 220.5(2) states (emphasis added):

> (2) *Intermingled Documents. If the documents to be seized cannot be searched for or identified without examining the con-*

4. *The administrative search precedents require invalidation of this Act under the Fourth Amendment*

The district court discussed in a footnote the cases involving "civil" as opposed to "criminal" searches (J.S. App. 75a-79a n. 56), and implied at various points in its opinion that the rights accorded to crimi-

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tents of other documents or if they constitute items or entries in account books, diaries, or other documents containing matters not specified in the warrant, the executing officer *shall not examine the documents* but shall either impound them under appropriate protection where found, or seal or remove them for safekeeping pending further proceedings pursuant to subsection (3) of this section.

The explanatory note to subsection 2 makes clear that the process of review of the documents, to resolve disputes over the limitations of the proposed search, is entrusted *not* to the governmental authority commanded to do the searching in the first instance, but rather to a judicial authority (emphasis added):

> When the "intermingling" problem is inescapably present, *the search is taken out of the hands of the officer executing the warrant*, who becomes a custodian of the intermingled documents, charged with their safekeeping until the provisions of subsection (3) come into play . . . .

The ALI Code analogy is also faulty because—as with the wiretapping analogy—the district court failed to recognize that the entire ALI Code structure is underpinned by the fact that it presupposes a search warrant (a) issued *ab initio* by a neutral magistrate and (b) limited to a particularized search in the context of specified crimes. Nothing in the Code suggests that the American Law Institute believes that a governmental authority could—consistent with the privacy values underpinning the Fourth Amendment—bootstrap its way into an "intermingled documents" problem by first defining its search objective in terms so broad and incapable of independent judicial definition that no room is left from the outset for the citizen's privacy.

nal suspects are somehow greater than for targets of administrative searches. This Court's decisions establish, we believe, that the reverse is true.

First, this Court's administrative search cases—and this Court's Fourth Amendment decisions generally—reject any notion that a citizen's privacy rights under the Fourth Amendment are somehow lessened if he is not the target of a search for evidence of crime.[71] In *Camara* v. *Municipal Court*, 387 U.S. 523, 530-31 (1967), the Court labeled such a notion a "rather remarkable premise" and rejected it as follows:

> But we cannot agree that the Fourth Amendment interests at stake in these inspections cases are merely "peripheral". It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Following this passage, the Court cited in a footnote Mr. Justice Brennan's dissenting views in *Abel* v. *United States*, 362 U.S. 217, 254-56 (1960), where, speaking for four members of the Court, it was said:

> One more word. We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" pro-

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[71] In view of Congress' "interest" in having the Administrator seize and review materials for purposes of their availability for "judicial proceedings" concerning, *inter alia*, "Watergate" (pp. 120-121, *supra*), it is a debatable proposition whether this statute is not in fact intended to serve as the equivalent of a search for evidence of crime.

> ceeding—such as matter bearing on the issue whether a man should forcibly be sent from the country. . . . I think it perverts the Amendment to make this distinction. The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the "right of the people to be secure in their persons, houses, papers, and effects." See *Boyd* v. *United States,* 116 U.S. 616, 627 [1886]. Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not." *Weeks* v. *United States, supra,* 232 U.S. at page 392 [1914].

Thus, under this Court's administrative search cases, an individual's privacy rights in our society are as fully protected against governmental intrusions for "civil" as for "criminal" purposes. The meaning of "reasonableness" for measuring the permissible limits of a governmental intrusion on privacy cannot be changed simply by relabeling the purpose of the search "civil" as opposed to "criminal."

Moreover, under this Court's Fourth Amendment cases measuring the permissible scope of the government's intrusion into the constitutionally protected privacy zone even for "civil" purposes, the invasion detailed by this statute is invalid. These cases were reviewed by this Court in *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973), where the Court concluded that "commercial enterprises engaged in businesses closely regulated and licensed by the Government" are deemed to "accept the burdens as well as the benefits of their trade." *Id.* at 271. In the present

case, given the district court's own premises concerning the appellant's justifiable expectation of privacy, there is no basis for similarly *implying* appellant's consent to the retroactive intrusion into the zone of private conversations. Nor is there anything analogous to a "long history of judicial and public acceptance" (*Camara* v. *Municipal Court,* 387 U.S. 523, 537 (1967)) for the search here.

Finally, unlike health inspections, border searches for illegal aliens, or business records relating to firearms and ammunition, the proposed governmental intrusion on privacy here is anything but "modest" or "impersonal". Five years of a man's communications and conversations, including the most intimate communications with wife, children, priest, and lawyer—long recognized by our Anglo-Saxon heritage to be the subject of one or another evidentiary privilege—are being unilaterally and retroactively seized without notice, placed beyond appellant's dominion and control, and subjected to "comprehensive screening" by governmental agents, all for the purpose of preserving the historical record.

In their totality, the district court's various efforts to justify, by analogy, the Act's invasion of the former President's privacy reflect the difficulty the court experienced in dealing with what it described as a troublesome challenge" (J.S. App. 67a). We submit that the reason the Fourth Amendment challenge is so troublesome is that never before has this government, to our knowledge, in any context or at any time, attempted to seize the entire product of more than five years of a man's life. The magnitude of this intrusion upon the most intimate aspects of Mr. Nixon's and his

family's lives can never be adequately described. We can state, however, that it is an unprecedented invasion of personal liberties which cannot be countenanced under the Fourth Amendment to our Constitution.

B. The Act Violates Mr. Nixon's Rights of Free Speech and Association.

A President is not only the Chief Executive of the Nation; he is also, in the nature of our political process, the head of the national political party that has offered him to the electorate as its candidate. And a substantial part of his working time must be spent on partisan political matters which are not the duties prescribed by Article II of the Constitution. The same considerations that prevent a President from keeping his private and personal records separate from his official communications and documents also preclude segregation of partisan political materials. Mr. Nixon described the political side of his activities as follows (App. 173-74):

> Many [presidential materials] reflect the fact that the President also serves as the head of his political party. In this regard I and members of my staff would often correspond with federal, state and local political officeholders and local political party officials. Such correspondence usually dealt in major part with partisan political matters. I also received memoranda concerning purely political matters from members of my staff and other government officials. For example, during my term as President I was requested on innumerable occasions to address political gatherings. Prior to such appearances members of my staff prepared for my personal use a "briefing book". These note books contained exclusively political

material. They listed, for example, all of the local political officials who would be in attendance and would describe their biographical background, their positions on various issues, and often personal vignettes that would be helpful to me in meeting and talking with them. The briefing books also described the issues that would be of concern to the organization or people requesting the appearance. If the appearance was on behalf of a local politician, the briefing book would describe the strengths and weaknesses of both the candidate and his opponent and where they both stood on matters of local and national concern. The briefing books also set forth suggestions for my remarks. I would frequently edit these drafts, noting additional points I wanted to make, and generally recording my thoughts as they pertained to the appearance. It is my recollection that there were hundreds of such briefing books prepared for my use. Similar books were prepared on legislative strategy, press conference briefings and literally hundreds of meetings I had in Washington and elsewhere with business, labor, education, religious and other groups concerning the whole fabric of American society. These books were retained and are among my presidential materials.

As was the case with matters dealing with my duties as a constitutional officeholder, it was also my practice in my role as head of my political party to engage in extensive and frequent discussions with members of my staff, members of Congress, other officials of government, governors, and state officials and personal friends and associates concerning a multitude of political matters. Many of those discussions were held in the Oval Office or my office in the Executive Office Building. Such discussions included, for example, whether I should support certain candidates for elected office and, if so, what form that support

> should take. In these discussions purely personal matters were often inextricably intermixed with political matters, and it would be virtually impossible to separate the various combinations of views and opinions expressed in them.

The materials that have been seized by this Act contain, according to the above description, candid evaluations of political figures, recommendations for political strategy, appraisals of issues that are entirely political in nature and verbatim recordings of discussions concerning "a multitude of political matters." The term "political," as used in this sense, is not to be taken demeaningly. Partisan politics is an integral part of our democratic process. This Court recently reaffirmed the principle that "freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments," and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper* v. *Pontikes,* 414 U.S. 51, 56-57 (1973). See also *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Button,* 371 U.S. 415 (1963).

Indeed, a fundamental premise of *Buckley* v. *Valeo,* 424 U.S. 1 (1976), which invalidated portions of a carefully considered and lengthily debated federal law on the ground that, in certain respects, it unconstitutionally restricted the right to engage in partisan politics, was that the kind of political activity that is the subject of this claim is at the heart of the First Amendment. This Court began its discussion of "general principles" by observing that limitations on political contributions and expenditures relate to "an area of the most fundamental First Amendment ac-

tivities." 424 U.S. at 14. It said that discussion and debate over campaign issues and qualifications "are integral to the operation of the system of government established by our Constitution" and that "[t]he First Amendment affords the broadest protection to such political expression. . . ." 424 U.S. at 14. The view of the Court on the centrality of partisan political activity to the protection afforded by the First Amendment was manifested by its quotation, with approval, of the language in *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971) (quoted in 424 U.S. at 15):

> [I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

It was argued in *Buckley* v. *Valeo* that since the statute there under consideration directly affected only the expenditure of funds, it constituted regulation of "conduct" and not "speech," and that only the "time, place and manner" of speech was controlled. This Court rejected those arguments in large part because it concluded that the statute's expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." 424 U.S. at 19.

The Act in question here deals directly with political speech. It subjects to outside examination by government employees—and to probable public scrutiny—more than five years' worth of the most intimate political communications of the man who was the head of the Republican Party, including nearly three year's worth of verbatim recordings of political briefings and strategy sessions conducted in Mr. Nixon's offices

or over his telephones, together with the former President's own personal evening reflections and judgments on political candidates and issues. The effect of such examination and disclosure is felt directly by the appellant, as an individual whose political expression is, by government fiat, seized and held up for microscopic public scrutiny. Even more important, however, is the effect that such a law, if constitutional, has on future Presidents or other high public officials whose own materials might someday be similarly seized. It necessarily inhibits their freedom of political activity and thereby reduces the "quantity and diversity" of the political speech and association that the Nation will be receiving from its leaders.

Like any other citizen, Mr. Nixon's right to express freely, in private, his personal views, which he may not wish publicized, on various political issues is protected by the Constitution. These rights are not waived by becoming a politician, any more than they are waived by becoming a school teacher or a policeman. *Garrity* v. *New Jersey,* 385 U.S. 493, 500 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 485-490 (1960); *City of Carmel-by-the-Sea* v. *Young,* 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 255 (1970). This Court has repeatedly recognized the manifest necessity of protecting the First Amendment rights of individuals in the political arena. *E.g., Bond* v. *Floyd,* 385 U.S. 116, 131-137 (1966); *Barr* v. *Matteo,* 360 U.S. 564 (1959). No one can seriously deny that a President or former President has the right to speak freely on subjects of partisan debate. And critical to public advocacy is the private formulation and discussion of political thought and perspective. This is a process of experiment and development. Stifling the trial and error aspect of the creation of political thought can frustrate the ultimate product as effectively as direct sanctions on speech itself.

The district court acknowledged that such First Amendment interests were implicated by the Act, and that public disclosure of Mr. Nixon's private political discussions would inhibit his future freedom of expression and would "chill" the future expression of other political figures (J.S. App. 89a-91a). It sustained the Act, however, on the ground that in the actual implementation of the law, the Administrator may construe his own proposed exception for materials involving "personal privacy" as covering "the privacy in political association protected by the First Amendment" (J.S. App. 91a n. 65). Because such a reading and application is "possible," the court held that it need not assume that political discussions will be disclosed. And it concluded, much as it had done on the subject of privacy, that "review by professional and discreet archivists" who would then "privately know the contents of materials" relating to Mr. Nixon's private partisan political activities, would not substantially impair his own political activities or "chill" the activities of others (J.S. App. 91a-92a).

By thus deferring until a later event consideration of appellant's constitutional claim because of the leeway provided the Administrator, the district court ignored an established principle of this Court's First Amendment decisions: Whether or not the right of free expression will be sustained may not be left by the legislature to the "unbridled discretion" of a government official. A statute which vests such broad authority is unconstitutional on its face, and the party subject to it may treat it as a nullity ***even if its actual implementation would not harm him.***

This constitutional principle was initially announced in *Lovell* v. *Griffin,* 303 U.S. 444, 452-453 (1938); where a municipality's system of advance licensing for the distribution of literature was found invalid, and this Court ruled that "it was not necessary for appellant to seek a permit under it." The doctrine has been applied in more recent decisions as well. *E.g., Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 150-51 (1969); *Cox* v. *Louisiana,* 379 U.S. 536 (1965); *Staub* v. *Baxley,* 355 U.S. 313, 319-21 (1958); *Thomas* v. *Collins,* 323 U.S. 516, 538-41 (1945).

In the *Cox* case, this Court enumerated the dangers of an overbroad delegation in the First Amendment area (379 U.S. at 557-58; citations omitted):

> This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

The critical point in the *Cox* case was that there were no provisions in the governing statute establishing standards for the determination of local officials as to which assemblies to permit and no administrative regulations limiting the broad power conferred by statute. 379 U.S. at 556. In this case, the statute is totally silent on the subject of political expression. The Administrator's proposed regulations—except with the extraordinary emendatory construction given by the district court's footnote 65—provide no suggestion that political exchange is given any weight at all. And even if "personal privacy" is modified as the court below would modify it, the ultimate decision as to which political dialogue to publish in the interests of history and which to restrict is left to the total discretion of the corps of "discreet archivists" headed by the Administrator. In the First Amendment area, such unguided authority is totally impermissible.

The alternative to striking the Act down because of its delegation of overbroad authority to the Administrator is to wait until he makes individualized judgments on particular conversations or memoranda reflecting political exchanges. The burden of litigating each such decision is surely one of the elements underlying the result reached in *Cox* and its predecessors. In addition, by leaving this sensitive First Amendment judgment to the Administrator, the Act encourages invidious discriminations as well as censorship of material that the Administrator, in his own judgment, would not like to have disclosed.

Since the district court, and even the appellees (see J.S. App. 91a-92a n. 65) appear to acknowledge a First Amendment interest in these materials, we will not burden this lengthy document with additional elaboration of the basis for such a claim. We would, how-

ever, direct the Court's attention to the very practical conclusion of a man who was both son and adviser to a former President who has been held in high esteem:

> Out of respect for history, few would like to see actual recorded facts intentionally blotted out of human knowledge. On the other hand, privacy is of particular importance to a politician. In our history, for example, we have had two former Presidents enter the halls of Congress: John Quincy Adams in the House and Andrew Johnson in the Senate; one former President, William Howard Taft, became Chief Justice of the United States.
>
> Certainly, premature disclosure of the intimate, subjective, combative exchanges behind the doors of the Oval Office could easily damage the usefulness of former Presidents who wish to continue in public service. And the quality of the advice a President would receive in office would certainly degenerate, or be unrecorded, if advisors spoke "for the record," conscious that their words would be made public at the end of a President's term.

John S.D. Eisenhower, "Those Presidential Papers," *The New York Times,* January 12, 1975. If this Act had no detrimental effect other than to undermine the ability of present and future officeholders to benefit from freewheeling, private discussions concerning political options and alternatives because advisers who someday wish to enter the public arena on their own may retreat from what might later be viewed as an unpopular position, it would be an unconstitutional infringement of the First Amendment. In addition, however, publication of the private political beliefs and actions of a public figure, which results in the immediate enlightenment of the public as to his innermost political thoughts and associations also defeats the free and open exchange of ideas by reducing the effectiveness of the Nation's leaders. On this basis, the Act must be declared invalid.

C. The Convergence Of First And Fourth Amendment Principles Requires Invalidation Of The Act.

We have discussed separately the former President's right of privacy and his rights of political expression and association because each is independently violated by this legislation. But we note, in concluding this section of our argument, that this case involves a "convergence" of those rights—a factor that has been invoked in several areas where this Court has evaluated the constitutionality of governmental action.

In *United States* v. *United States District Court,* 407 U.S. 297, 313-314 (1972), the invalidity of warrantless eavesdropping in "domestic security" cases was based principally on the Fourth Amendment. This Court's opinion noted, however, that the case was not merely one involving the right of privacy, but that—given the usual nature of "national security cases"—the intrusion by governmental authority presents "greater jeopardy to constitutionally protected speech." The Court warned that "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." 407 U.S. at 314. Similar need for greater Fourth Amendment protections exists when the "targets" are leading political figures whose partisan views may be popular at one time and highly unpopular at another. Here, as with "unorthodox" political beliefs, there are severe risks to national interests in free speech if overbroad invasions of privacy are permitted.

The "convergence" of First and Fourth Amendment interests was, of course, a factor in *Stanford* v. *Texas,* 379 U.S. 479 (1965), the leading "general warrant" decision on which we rely in our invasion-of-privacy argument. This Court cautioned in *Stanford* that the history of the Fourth Amendment (379 U.S. at 485; footnote omitted)

> . . . teaches . . . that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain . . . No less a standard could be faithful to First Amendment freedoms.

See also, Marcus v. *Search Warrant,* 367 U.S. 717 (1961). In this case, the added and important dimension of the First Amendment is present. The Act seizes and examines papers and conversations totally protected by the constitutional safeguard for free expression.

D. Archivists, Even If "Professional And Discreet," Do Not Satisfy The Constitutional Standard.

In discussing both the First and Fourth Amendment claims (as well as in other portions of its opinion) the district court minimized the Act's effect on appellant by describing the prospective reviewers of his materials as "discreet and professional" archivists with "an unblemished record for discretion" (J.S. App. 83a, 88a). Because of the archivists' asserted distinguished personal qualifications, the intrusion resulting from their examinations were said to be slight.

There is, of course, nothing in the legislative record to establish the archivists' record as blemished or not; that question seemed farthest from Congress' mind. No professional standard is fixed by the Act, no oath or

other obligation of secrecy is imposed, and the district court's conclusion appears to rest more on the court's own extrajudicial admiration for history and historians than on any facts of record or those which might be judicially known.

We do not believe that this case should turn, however, on the reputations of historians in general, or of the particular corps of some one hundred archivists whom the Administrator might assign to the subject. One thing is clear: archivists are not judges. No matter how "professional and discreet" they may be, they cannot make the judicial evaluations that are essential to protect the Fourth Amendment. Nor, we submit, in view of their professional bias for historical preservation can they dispassionately balance the harm to political association against the interest in "accurate history" that would resolve the First Amendment issue.[72]

We are not alone in our skepticism of the neutrality or disinterest of the archivists. It was recently proposed that GSA archivists conduct an initial review—similar to the procedure approved here by the district court—of secretarial transcriptions of the telephone conversations of former Secretary of State Kissinger. In an opinion memorandum, the Legal Adviser of the Department of State concluded that such a procedure would not protect the interests of the Department. He referred to the "advocate's interest" of the GSA

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[72] The archivists' commitment to preservation and public availability of historical materials is, we submit, amply demonstrated by the numbers of government archivists, including the Archivist of the United States and Deputy Archivist, who are active members in the American Historical Association which has intervened in this suit to promote interests adverse to appellant.

(Memorandum of January 14, 1977, by the Legal Adviser of the Department of State, p. 4):

> Recently, the GSA has espoused a view that personal papers are limited to material pertaining solely to an individual's private affairs, and not at all to his official activities. This view implies that traditionally personal materials (like diaries, notes and family correspondence) which discuss a person's official activities, are official records. . . . This approach, among others, has also been suggested to the National Study Commission on Records and Documents of Federal Officials, which has the task of proposing for the first time, government-wide legislation on the personal-official paper distinction. In that forum, GSA is a proponent for a definition of official records that is inconsistent with Department of State regulations. In view of this advocate's interest, it would not seem appropriate for GSA archivists to preempt the Department of State by reviewing the notes in question.

This Court held in *United States* v. *United States District Court,* 407 U.S. 297, 317 (1972), that executive branch personnel involved in investigative and prosecutorial duty could not substitute for the "neutral and disinterested magistrates" that the Fourth Amendment demands. This judgment did not turn, of course, on whether the attorneys who would be acting for the executive branch were "professional and discreet." *See also Camara* v. *Municipal Court,* 387 U.S. 523, 532-33 (1967); *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

In this case, the constitutional judgments should be made by judicial officers. Archivists, regardless of their records, are not the group in whom the Constitution

vests that authority. Congress had an obligation to leave judicial questions to the courts, and its failure to do so, in both the First and Fourth Amendment areas, cannot be cured by the district court's repeated compliments to the profession that was unlawfully selected to assume the judges' responsibilities.

CONCLUSION

The Presidential Recordings and Materials Preservation Act is plainly not a routine federal statute. It deals with a situation that has been described in papers below as a "unique problem," and the Act is defended, in large measure, on the basis of the unusual events that led to its adoption. The Constitution stands, however, as a bulwark of enduring principle against the vicissitudes of political history and public opinion. In *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, 528 (1935), this Court summarized the lessons of our constitutional development:

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be in both war and peace, but these powers of the national government are limited by the constitutional grants.

In this case, Congress has enacted legislation that could have a lasting and disruptive effect on the way our government is structured and how it has operated successfully for two centuries. The decision of the district court upholding Congress' improvident exer-

cise of power should be reversed with instructions to enter a declaratory judgment that Title I of the Act is unconstitutional and to issue a permanent injunction against implementation of it's provisions.

Respectfully submitted,

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APPENDIX

APPENDIX I

Public Law 93-526

NINETY-THIRD CONGRESS OF THE UNITED STATES OF AMERICA
AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-first day of January, one thousand nine hundred and seventy-four

An Act

To protect and preserve tape recordings of conversations involving former President Richard M. Nixon and made during his tenure as President, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Presidential Recordings and Materials Preservation Act".

TITLE I—PRESERVATION OF PRESIDENTIAL RECORDINGS AND MATERIALS

Delivery and Retention of Certain Presidential Materials

SEC. 101. (a) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, any Federal employee in possession shall deliver, and the Administrator of General Services (hereinafter in this title referred to as the "Administrator") shall receive, obtain, or retain, complete possession and control of all original tape recordings of conversations which were recorded or caused to be recorded by any officer or employee of the Federal Governmnt and which—

(1) involve former President Richard M. Nixon or other individuals who, at the time of the conversation, were employed by the Federal Government;

(2) were recorded in the White House or in the office of the President in the Executive Office Buildings located in Washington, District of Columbia; Camp David, Maryland; Key Biscayne, Florida; or San Clemente, California; and

(3) were recorded during the period beginning January 20, 1969, and ending August 9, 1974.

(b)(1) Notwithstanding any other law or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the Administrator shall receive, retain, or make reasonable efforts to obtain, complete possession and control of all papers, documents, memorandums, transcripts, and other objects and materials which constitute the Presidential historical materials of Richard M. Nixon, covering the period beginning January 20, 1969, and ending August 9, 1974.

(2) For purposes of this subsection, the term "historical materials" has the meaning given it by section 2101 of title 44, United States Code.

AVAILABILITY OF CERTAIN PRESIDENTIAL MATERIALS

SEC. 102. (a) None of the tape recordings or other materials referred to in section 101 shall be destroyed, except as hereafter may be provided by law.

(b) Notwithstanding any other provision of this title, any other law, or any agreement or understanding made pursuant to section 2107 of title 44, United States Code, the tape recordings and other materials referred to in section 101 shall, immediately upon the date of enactment of this title, be made available, subject to any rights, defenses, or privileges which the Federal Government or any person may invoke, for use in any judicial proceeding or otherwise subject to court subpoena or other legal process. Any request by the Office of Watergate Special Prosecution Force, whether by court subpoena or other lawful process, for ac-

cess to such recordings or materials shall at all times have priority over any other request for such recordings or materials.

(c) Richard M. Nixon, or any person whom he may designate in writing, shall at all times have access to the tape recordings and other materials referred to in section 101 for any purpose which is consistent with the provisions of this title, subsequent and subject to the regulations which the Administrator shall issue pursuant to section 103.

(d) Any agency or department in the executive branch of the Federal Government shall at all times have access to the tape recordings and other materials referred to in section 101 for lawful Government use, subject to the regulations which the Administrator shall issue pursuant to section 103.

REGULATIONS TO PROTECT CERTAIN TAPE RECORDINGS AND OTHER MATERIALS

SEC. 103. The Administrator shall issue at the earliest possible date such regulations as may be necessary to assure the protection of the tape recordings and other materials referred to in section 101 from loss or destruction, and to prevent access to such recordings and materials by unauthorized persons. Custody of such recordings and materials shall be maintained in Washington, District of Columbia, or its metropolitan area, except as may otherwise be necessary to carry out the provisions of this title.

REGULATIONS RELATING TO PUBLIC ACCESS

SEC. 104. (a) The Administrator shall, within ninety days after the date of enactment of this title, submit to each House of the Congress a report proposing and explaining regulations that would provide public access to the tape recordings and other materials referred to in section 101. Such regulations shall take into account the following factors:

(1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";

(2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

(b)(1) The regulations proposed by the Administrator in the report required by subsection (a) shall take effect upon the expiration of ninety legislative days after the submission of such report unless such regulations are disapproved by a resolution adopted by either House of the Congress during such period.

(2) The Administrator may not issue any regulation or make any change in a regulation if such regulation or

change is disapproved by either House of the Congress under this subsection.

(3) The provisions of this subsection shall apply to any changes in the regulations proposed by the Administrator in the report required by subsection (a). Any proposed change shall take into account the factors described in paragraph (1) through paragraph (7) of subsection (a), and such proposed change shall be submitted by the Administrator in the same manner as the report required by subsection (a).

(4) Paragraph (5) is enacted by the Congress—

(A) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it shall be considered as part of the rules of each House, respectively, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(B) with full recognition of the constitutional right of either House to change such rules (as far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(5)(A) Any resolution introduced under paragraph (1) shall be referred to a committee by the Speaker of the House or by the President of the Senate, as the case may be.

(B) If the committee to which any such resolution is referred has not reported any resolution relating to any regulation or change proposed by the Administrator under this section before the expiration of sixty calendar days after the submission of any such proposed regulation or change, it shall then be in order to move to discharge the committee from further consideration of such resolution.

(C) Such motion may be made only by a person favoring the resolution, and such motion shall be privileged. An

amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(D) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed.

(E) When the committee has reported, or has been discharged from further consideration of, a resolution introduced under paragraph (1), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be privileged. An amendment to such motion is not in order, and it is not in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(6) For purposes of this subsection, the term "legislative days" does not include any calendar day on which both Houses of the Congress are not in session.

(c) The provisions of this title shall not apply, on and after the date upon which regulations proposed by the Administrator take effect under subsection (b), to any tape recordings or other materials given to Richard M. Nixon, or his heirs, pursuant to subsection (a)(7).

(d) The provisions of this title shall not in any way affect the rights, limitations or exemptions applicable under the Freedom of Information Act, 5 U.S.C. § 552 et seq.

JUDICIAL REVIEW

SEC. 105. (a) The United States District Court for the District of Columbia shall have exclusive jurisdiction to hear challenges to the legal or constitutional validity of this title or of any regulation issued under the authority granted by this title, and any action or proceeding involving the question of title, ownership, custody, possession, or control of any tape recording or material referred to in section 101 or involving payment of any just compensation

which may be due in connection therewith. Any such challenge shall be treated by the court as a matter requiring immediate consideration and resolution, and such challenge shall have priority on the docket of such court over other cases.

(b) If, under the procedures established by subsection (a), a judicial decision is rendered that a particular provision of this title, or a particular regulation issued under the authority granted by this title, is unconstitutional or otherwise invalid, such decision shall not affect in any way the validity or enforcement of any other provision of this title or any regulation issued under the authority granted by this title.

(c) If a final decision of such court holds that any provision of this title has deprived an individual of private property without just compensation, then there shall be paid out of the general fund of the Treasury of the United States such amount or amounts as may be adjudged just by that court.

AUTHORIZATION OF APPROPRIATIONS

SEC. 106. There is authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

Supreme Court, U. S.
FILED
MAR 3 1977
MICHAEL RODAK, JR., CLERK

No. 75-1605

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD NIXON, APPELLANT

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL APPELLEES

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OPINIONS BELOW

The opinion of the three-judge district court (J.S. App. 1a-106a) is reported at 408 F. Supp. 321. Opinions of the court of appeals concerning the convening of the three-judge district court (J.S. App. 139a-202a) are reported at 513 F. 2d 427 and 430.

JURISDICTION

The judgment of the three-judge district court (J.S. App. 107a-108a) was entered on January 7, 1976. A notice of appeal (J.S. App. 109a) was filed on March 4, 1976, and the jurisdictional statement

was filed on May 3, 1976. Probable jurisdiction was noted on November 29, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

Whether the Presidential Recordings and Materials Preservation Act is unconstitutional on its face as a violation of (1) the separation of powers; (2) presidential privilege doctrines; (3) the Bill of Attainder Clause; (4) appellant's privacy interests; or (5) appellant's First Amendment rights.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article I, Section 9, clause 3 of the Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article IV, Section 3, clause 2 of the Constitution provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The First Amendment to the Constitution provides in relevant part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *.

The Fourth Amendment to the Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. V) 2107 note and 3315-3324, is set out at J.S. App. 110a-123a.

STATEMENT

1. Appellant resigned as President of the United States effective August 9, 1974. When he left office a large quantity of documents, files, and other materials, which had been accumulated by him and his staff during his terms as President, remained in the government's custody (J.S. App. 7a-9a). These materials include approximately 42 million pages of documents (J.S. App. 40a; A. 514). Appellant estimates that he personally prepared or reviewed 200,000 documents from this collection (A. 516). The materials also include more than 800 reels of tape recordings of conversations in the Oval Office, the Cabinet Room, and the Lincoln Sitting Room in the

White House, and in appellant's offices in the Executive Office Building and Camp David. Numerous dictabelt recordings of appellant's recollections of daily events also are included (J.S. App. 40a; A. 178, 218).[1] After appellant's resignation, government archivists began to collect these materials for shipment to California, in accord with appellant's instructions (J.S. App. 9a-10a).

Before releasing any materials for disposition according to appellant's pre-resignation instructions, President Ford asked the Attorney General for advice about the ownership of the materials. The Attorney General concluded that, with the possible exception of one type of document, the materials were owned by appellant by virtue of historical practice and the absence of any statute to the contrary (43 Op. Att'y Gen. No. 1 (September 6, 1974); A. 220-230).[2] Appellant's ownership interest was not regarded as unqualified, however. The Attorney General informed President Ford (A. 226):

[1] On leaving the White House, appellant took with him some personal notes, diaries, and dictabelts (A. 600-601). He has full possession of these materials.

[2] The Attorney General expressed no opinion concerning ownership of certain "permanent files." These files consist of materials traditionally retained in the White House from administration to administration, such as "White House budget and personnel material, and records or copies of some Presidential actions useful to the Clerk's office for such purposes as keeping track of the terms of Presidential appointments and providing models or precedents for future Presidential action" (A. 228). Appellant claims no rights to these materials in this action (J.S. 12).

> Historically, there has been consistent acknowledgement that Presidential materials are peculiarly affected by a public interest which may justify subjecting the absolute ownership rights of the ex-President to certain limitations directly related to the character of the documents as records of government activity.

The Attorney General's opinion also stated that appellant's ownership interest was qualified by exposure to court orders regarding the materials and based upon their unique nature (A. 229-230).

Following President Ford's receipt of this opinion, the Administrator of General Services executed a depository agreement with appellant (A. 38-43).[3] Under the agreement, appellant retained title to all of his presidential historical materials but agreed to donate a substantial portion of the materials to the United States at a future date so that they would "be made available, with appropriate restrictions, for research and study" (A. 38). While appellant reviewed the materials, they were to be deposited with the General Services Administration ("GSA") under the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and transferred to California, where they would be stored in locked areas. Neither appellant nor GSA could gain access to the materials without the consent of the other (A. 39).

The agreement provided that for three years appellant would not withdraw any original writing, al-

[3] The agreement is reported at 10 Weekly Comp. of Pres. Docs. 1104 (1974).

though he could make and withdraw copies. After the initial three-year period appellant could withdraw any of the materials other than tape recordings (A. 39-40). Appellant agreed not to withdraw any original tape recording of conversations in the White House or Executive Office Building for five years, and to make reproductions of the tapes only with GSA's consent.

During the three and five year periods, appellant or government archivists working under his direction were to review the materials; those he did not withdraw would be donated to the United States, with appropriate restrictions on public access (A. 43). Following the initial five-year period for the review of tape recordings, appellant would be entitled to designate any tape recording to be destroyed. All of the tape recordings were to be destroyed after the expiration of ten years (September 1, 1984) or upon appellant's death, whichever event occurred first (A. 41).

Implementation of this agreement was delayed at the request of the Watergate Special Prosecutor (J.S. App. 12a). Appellant then brought suit for specific performance of the agreement. The Special Prosecutor and Jack Anderson, a reporter, intervened; the case was consolidated with actions brought by other plaintiffs that claimed to be interested in appellant's presidential materials, all seeking to enjoin transfer of the materials and to gain access to them under the Freedom of Information Act, 5 U.S.C. (Supp. V) 552.

2. While these consolidated actions were pending,

Congress passed and the President signed the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 *et seq.*, 44 U.S.C. (Supp. V) 2107 note and 3315-3324. Section 101 of the Act abrogates appellant's depository agreement with GSA and directs the Administrator of General Services to obtain and retain possession and control of all the presidential historical materials and tape recordings from appellant's administration. Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke * * *." Sections 102(c) and (d) provide that appellant (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.

Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104(a)):

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;

(3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 104(a) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes can be disapproved by a resolution of either House within 90 legislative days of submission.[4] Section 105 pro-

[4] The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed., September 11, 1975). The Administrator has not sought to enforce these disapproved regulations, and no party to this litigation claims any rights under them. The second set was withdrawn; the

vides for "just compensation" to any individual whose private property is taken under the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed but has not yet submitted its report; it is not involved in this litigation.

3. The day after the Act became effective, appellant commenced this action for declaratory and in-

Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. S5290-S5291 (daily ed., April 8, 1976). The third set was submitted on April 13, 1976, and on September 14, 1976, the House disapproved six of the provisions. H.R. Res. 1505, 94th Cong., 2d Sess. (1976). The six provisions disapproved by the House were among the seven that had been disapproved by the Senate after the second proposed set of regulations had been withdrawn. The sponsor of the resolution disapproving the six provisions stated that, in his view, all of the submitted regulations except the disapproved provisions thereupon became effective. 122 Cong. Rec. H10043-H10044 (daily ed., September 14, 1976). It is the position of the Administrator, however, that the regulations cannot become effective until they have been approved as a package, since the approval of isolated regulations does not leave a coherent program. The Administrator therefore is preparing a fourth set of regulations and expects to submit them to Congress soon.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. Part 105-63. The district court has enjoined the effectiveness of some of these regulations pending disposition of this appeal (J.S. App. 104a-108a).

junctive relief in the United States District Court for the District of Columbia. He challenged the constitutionality of the Act on various grounds, and sought the convening of a three-judge district court. The district court declined to rule upon the request; it filed an opinion in the consolidated cases growing out of appellant's agreement with GSA. *Nixon* v. *Sampson*, 389 F. Supp. 107 (D. D.C.). The Court of Appeals for the District of Columbia Circuit stayed entry of judgment in the consolidated cases to enable a three-judge district court to determine whether priority should be accorded to the present action (J.S. App. 139a-202a).

A three-judge district court was convened, and the court allowed the other parties to the consolidated cases, who were not originally parties to this case, to intervene. The Special Prosecutor intervened and subsequently withdrew (A. 130, 484-487). Since the court of appeals' stay barred any *res judicata* or collateral estoppel effects of the single judge's opinion in *Nixon* v. *Sampson*, *supra*, the three-judge district court independently considered appellant's arguments.

The court rejected appellant's challenges to the facial constitutionality of the Act (J.S. App. 1a-106a). Noting that the regulations to implement the Act are not yet effective and that any challenge to the implementation of the Act is premature, the court limited its inquiry to the taking of the materials into the government's custody and their screening by government archivists (J.S. App. 3a-4a, 19a-

31a). The court carefully considered and rejected each of the arguments appellant makes here.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case requires the Court to determine whether the Act of Congress allowing officials of the Executive Branch to take custody of and examine certain materials generated by the Executive Branch during appellant's terms as President is constitutional on its face. Appellant contends that it is not. His arguments are identical in function, if not in form, to those he made, and this Court rejected, in *United States* v. *Nixon*, 418 U.S. 683.

Appellant maintains nothing less than that he is the only proper judge of his claims of privilege and privacy. He contends not only that he has the final decision whether particular documents are private or privileged, but also that no person may scrutinize his decisions. Under his argument, only he can look at the materials, because for anyone else to look at or listen to the materials to determine whether they are privileged or private would itself be a breach of privacy and a violation of his privilege. The upshot of this is that appellant has not only the last say but also the only say. In *United States* v. *Nixon*, *supra*, appellant made similar arguments in the context of an inquiry by the Judicial Branch of government; now he makes them in the context of an inquiry by the Executive Branch.

The arguments fare no better now than they did before. The question whether particular documents

(or categories of documents) are private or privileged may be quite difficult, but the decision need not be left to appellant. The answer usually will depend upon the purpose for which the material was created, the extent to which the material was circulated to persons other than appellant, the effect disclosure would have upon the giving of advice and the uninhibited discussion of policies that is essential to the proper functioning of the Executive Branch, and the countervailing interests of other persons in obtaining access to the materials. No categorical answer can be given, and the problems will require sensitive tools for their resolution.

For example, the parties agree that the considerations of politics and personalities that influence the nomination of a person as a federal judge ought not to be spread upon the public record. Such disclosure would inhibit the submission and consideration of frank views, and it would invade the privacy not only of those who submitted opinions but also of those who were considered for the position. On the other hand, no privilege would attach to a revelation that a nomination had been made in exchange for a political contribution, because that would amount not to the discussion of politics or public affairs, but to the commission of a crime. Although we do not suggest that nominations were in fact exchanged for money, this example suggests that a blanket claim of privacy or privilege cannot be sustained.

Moreover, the files of the White House Office contain many types of documents that are inter-

mingled. Copies of the Congressional Record and committee prints are among the documents; photocopies of newspaper and magazine articles are there; documents that were circulated among Cabinet departments but never seen by appellant are there. Appellant has not argued that these documents are privileged or that disclosure of them would invade his privacy. Separation of the privileged from the unprivileged, the private from the public, cannot be accomplished merely by naming categories of documents, however; because many documents are commingled, someone must sort through them.

Appellant argues that he is the only person who may do the sorting, the only person who may separate the public from the private, the privileged from the unprivileged. This claim entails assertion of authority over all materials, whatever their status; in appellant's view, no one may second-guess his decisions, because no one else legitimately may have access to the information necessary to second-guess him. This assertion fails because not all materials accumulated during appellant's terms of office are privileged or private.

Appellant contends that he can be counted upon to decide fairly and accurately which information is privileged and which is not. Whether or not this is correct, the archivists who will do the screening under the Act challenged here also can be counted upon to decide fairly and correctly which information is privileged or private and which is not. Their record for discretion is unblemished.

Appellant responds that the archivists will apply incorrect standards. They will, appellant contends (Br. 69, 80-81), require him to justify every claim of privilege, thus turning the presumptive privilege recognized in *United States* v. *Nixon, supra,* into a presumptive absence of privilege. But appellant overlooks the fact that he is challenging the Act on its face, and that such a challenge limits the range of arguments that may be considered.

The most important feature of this case, one we emphasize repeatedly in this brief, is that almost all appellant's arguments are based upon hypothetical possibilities, none of which has occurred. There has been no public access; he has never been denied access to any of his presidential materials; no claims of privilege have been determined adversely to him; no presumption has been reversed. Appellant argues as if massive disclosures of private or privileged documents or tapes are imminent, but they are not.

The portions of the Act at issue here do three things. First, the Act provides that appellant does not have sole control of the materials of his presidency. Under the Act, appellant receives, on request, a copy of any of the materials that have been impounded. In this respect, the Act is not significantly different from the depository agreement appellant voluntarily proposed to the GSA; that depository agreement established a two-key system under which appellant could not gain access to any materials without the permission of GSA.

Second, the Act provides that employees of the Executive Branch have access to the materials for lawful purposes. There is no flaw here for, as appellant recognizes (Br. 116-117), legal principles establish that employees of the Executive Branch have access to presidential papers when necessary for the conduct of governmental business. Appellant has not argued that any access provided to employees of the government has to date infringed any privilege of his or invaded his privacy.

Third, the Act provides that government archivists will screen the materials, sorting out those of general historical interest or related to abuse of power.[5] The Administrator is directed to promulgate regulations that will govern both the screening of the materials and the conditions of eventual access to some of them by persons outside the government.

The Act has not left the Administrator without standards in executing this sensitive task. It explicitly provides that there is a "need to prevent general access * * * to information relating to the Nation's security" (Section 104(a)(3)). It directs that the regulations recognize "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (Section 104(a)(5)). And it directs that the regulations recognize

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[5] The Act also provides that the materials must be held available to the judicial process, but in this respect it does not change any expectation of appellant. Appellant does not argue that this exposure is unconstitutional, nor could he. *United States* v. *Nixon, supra.*

"the need to give to Richard M. Nixon or his heirs, for his sole custody and use, tape recordings and other materials" not related to abuse of power and "not otherwise of general historical significance" (Section 104(a)(7)). These standards deprive appellant's arguments of much of their force and demonstrate that most of his claims are premature.

In light of these statutory standards, three general questions must be decided before any presidential material will be made public. First, will personnel of the Executive Branch have access to any of the materials, for any purpose? Second, how will the archivists screen the materials and go about making decisions concerning them? Third, what should be done with particular materials? Only the first of these questions is presented in this case, because only it can be resolved by comparing the Act on its face with the requirements of the Constitution.

Most of appellant's arguments rest upon the premise that already his privileges have been abrogated and his privacy invaded. Yet the Act, on its face, carefully preserves all of his privileges and provides for the return of private materials to appellant. Appellant responds that these guarantees are illusory because his privileges will be ignored in fact and private documents will not be returned. These arguments, however, do not attack the statute on its face. To the contrary, Section 104(a)(5) guarantees appellant all of his privileges—including the presumptive privilege for presidential communications recognized in *United States* v. *Nixon, supra.*

The only claim properly before the Court is that no constitutional set of regulations implementing the Act could be drafted. That claim could be correct only if no eyes other than appellant's may see the materials for any purpose. We do not argue that that claim is unripe—far from it; the Act is in operation, the Administrator has custody of the materials, and screening by archivists is inevitable. The fact that this attack on the face of the statute is ripe for decision does not mean, however, that every hypothetical question concerning future administration of the Act also is ripe for decision. The claim is ripe, but narrow.[6]

Appellant attempts to evade the limitations upon facial challenges by invoking the rights of future Presidents and by arguing against the portions of the regulations already issued. Appellant's attempt to invoke the rights of other Presidents, even if otherwise permissible, fails because the Presidents follow-

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[6] Appellant's discussion of ripeness (Br. 46-48) is therefore beside the point. The question is not whether this Court should abstain altogether, but whether it should dissect all of the arguments appellant presents. Cf. *Young* v. *American Mini Theatres, Inc.*, No. 74-312, decided June 24, 1976, slip op. 7-11 (declining to decide all tendered challenges to an ordinance affecting First Amendment interests); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-614. Some of the consequences of the Act are inevitable and therefore ripe for disposition (see *Buckley* v. *Valeo*, 424 U.S. 1, 114-118), but other consequences predicted by appellant are speculative, abstract, and contingent on the promulgation of regulations and the taking of discretionary action in particular circumstances under those regulations; they therefore are unripe.

ing appellant do not agree with the position he attempts to assert on their behalf; President Ford signed and defended the Act, and the incumbent President also supports the Act.[7] Moreover, although some presently effective regulations may be causing appellant cognizable harm, his complaint (A. 17-35) does not challenge any of these regulations, and none was considered by the district court.

If, as appellant contends, the regulations that have been and will be issued conflict with the Act or give insufficient weight to his legitimate interests, those regulations may be attacked and set aside *as violations of the Act.* That hardly would demonstrate that the Act is unconstitutional on its face. Appellant's assertion (Br. 48) that regulations sufficient to protect his interests "are remote from the Administrator's mind" therefore tells us nothing about the facial constitutionality of the Act.

The Court should not accept appellant's invitation to reach out to decide the difficult questions that may be presented by future administration of this Act. It is enough at the present time to determine whether depriving appellant of absolute custody over the materials, and allowing the materials to be screened by disinterested archivists, is constitutional. It would not be a proper exercise of the judicial func-

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[7] None of this Court's cases allowing parties to invoke the rights of third persons (see, *e.g., Craig* v. *Boren*, No. 75-628, decided December 20, 1976, slip op. 4-6) has dealt with a situation in which the third persons explicitly repudiated the litigant who purported to act in their best interests.

tion under Article III of the Constitution for this Court now to rush to judgment on the many serious and sensitive issues that, in time, may have to be decided. Those issues are not yet so squarely presented that definitive resolution by this Court is necessary or appropriate. As the district court put it (J.S. App. 21a): "Objections [appellant] now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass * * *."

A. Appellant first argues that, under the principle of separation of powers, each branch of government must have the ability to control the disposition of its own papers. Nothing is being done under the Act, however, against the will of the Executive Branch. The Administrator of GSA, the custodian of the materials, is an Executive Branch official, appointed by the President. The Administrator makes all regulations; Executive Branch archivists will do the screening. All that is at stake now is whether employees of the Executive Branch can take custody of and examine materials accumulated during appellant's tenure. A former President cannot rely upon the separation of powers to keep the incumbent President and Executive Branch personnel from examining materials generated and held by the Executive Branch.

In any event, the argument that the Executive Branch is immune from all congressional regulation of its papers is incorrect. The Freedom of Informa-

tion Act and many other laws demonstrate this. There is no general principle, based on the separation of powers, forbidding Congress to require that some Executive Branch papers must be made available to the public. The inhibition on disclosure comes, if at all, from presidential or executive privileges.

B. Appellant's argument that the Act annuls his presidential privilege is incorrect. Although a President has a presumptive privilege vis-a-vis the public, he has no similar privilege vis-a-vis his successors and the Executive Branch. The papers appellant seeks to withhold from the archivists were generated by the Executive Branch and paid for with public funds. Many of them may be important to the continuing conduct of the affairs of state. No blanket privilege exists with respect to these documents.

Appellant's privilege might well be breached by exposure of some of these materials to persons outside the Executive Branch. But the Act states (Section 104(a)(5)) that no documents shall be released in violation of such a privilege, and it therefore is not unconstitutional on its face. Whether particular materials or categories of materials are privileged is a question that must be resolved at a later date. Appellant does not argue that all of the 42 million pages of documents the Administrator now holds are privileged, and he therefore cannot maintain that any public disclosure of any document would be inconsistent with his privilege.

C. The Act is not a bill of attainder or of pains and penalties. Appellant argues that he was singled

out for special treatment, and that he has suffered trial by legislature. But the Act was narrow because the need for legislation was narrow. Because of his resignation, appellant's status is unique, and the documents of his presidency thereby assume unusual historical significance. Moreover, at the time of enactment appellant was the only former President whose materials were not in a presidential library. The Act draws a distinction that was justified by the problems confronting Congress. Moreover, it is difficult to understand how an act providing for just compensation for any property taken can be thought to be a bill of pains and penalties.

D. Appellant's argument that the process of screening the materials itself will invade his privacy is unpersuasive. Appellant was a public figure; he willingly sought the office of President, and by doing so he surrendered any "privacy" interest in the way he discharged his duties and administered his public trust.

It is true that, among the documents now held by the Administrator, many are genuinely private because they do not pertain to appellant's performance of his duties. But a relatively small proportion of the documents meet that description, and the Act provides (Section 104(a)(7)) that these shall be returned to appellant once they are identified. Appellant contends that this provision might be narrowly interpreted in a way that enables the public to view his private letters and communications with his family, but there is no reason to suppose that

this will be so. The Act should not be construed in a way that makes it unconstitutional; the Court's duty, rather, is to give the Act a construction that preserves it against constitutional challenge.[8]

E. Appellant's assertion that the Act chills his freedom of speech and association must fall with his argument concerning privacy. Not every statute having an incidental effect upon speech is unconstitutional. *Buckley* v. *Valeo*, 424 U.S. 1. The Act would affect appellant's speech only insofar as it improperly invaded his privacy, and there is no facially invalid invasion of privacy here. Moreover, the Act applies only to presidential papers and does not apply to any statements made or received by appellant after leaving office. The Act therefore has no prospective effect upon his speech.

ARGUMENT

THE PRESIDENTIAL RECORDINGS AND MATERIALS PRESERVATION ACT IS NOT UNCONSTITUTIONAL ON ITS FACE

Appellant makes a number of sweeping arguments, which he augments with multiple hypothetical illustrations. He then discusses the illustrations and endeavors to show why the Act would be unconstitutional if it brought about such a parade of horribles. We have argued at pages 11-19, *supra*, that this Court should not now consider these elaborate hypotheticals and the abstract legal principles that might per-

[8] See, *e.g.*, *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32; *United States* v. *Harriss*, 347 U.S. 612, 618.

tain to them. There will be time enough to pass upon them when the public access regulations have been promulgated and when decisions with respect to particular materials are being made. Review of such regulations and decisions would provide the courts with the concrete situations that are conducive to proper resolution of the difficult problems that may be involved.

As to what remains, appellant's position is not persuasive. Appellant's "elaborate argument * * * does not need an elaborate answer." *United States* v. *Wurzbach*, 280 U.S. 396, 399 (Holmes, J.).

A. The Act Does Not Invade The Autonomy Of The Executive Branch

1. *The principle of separation of powers does not prevent employees of the Executive Branch from screening materials created by the Executive Branch*

Appellant's principal argument is that the Act is an unconstitutional encroachment on powers reserved to the Executive Branch. Far from invading the autonomy of the Executive Branch, however, the Act places the materials in the custody of the Administrator, an executive official responsible to the President, and provides that Executive Branch employees have access to the materials "for lawful Government use, subject to the [Administrator's] regulations" (Section 102(d)). See 41 C.F.R. 105-63.205, 105-63.206 and 105-63.302.

The Act also provides that the materials are to be made available for use in judicial proceedings, but

such availability is expressly subject to any rights, defenses, or privileges which any person may invoke. Although the Act contemplates that the public ultimately will have access to some of the materials of historical value, it also recognizes the need "to protect any party's opportunity to assert any legally or constitutionally based right or privilege" (Section 104(a)(5)) and provides for the return of other materials to appellant (Section 104(a)(7)). The Act thus ensures that there will be no disclosure of the materials to persons outside the Executive Branch in violation of any defenses or privileges asserted by appellant or the Executive Branch. Cf. *United States* v. *Nixon*, 418 U.S. 683.

Appellant is in much the same position he would have occupied if the Administrator, instead of entering into a depository agreement, had refused to allow appellant to take physical possession of the materials and had asserted that the Executive Branch has full dominion over them. Appellant could not have objected to this on separation of powers grounds.

The central point, in this regard, is that nothing is being done against the will of the Executive Branch. All that is at stake now, in a challenge to the facial validity of the Act, is whether Executive Branch employees may have access to papers and other materials accumulated during appellant's terms of office, either to screen the papers and materials for the purposes set forth in the Act or to use them to the extent necessary in carrying out their executive

responsibilities.[9] No case suggests that a former official of the Executive Branch, even a former President, can raise a separation of powers argument to keep the incumbent President and Executive Branch personnel from examining materials generated and held by the Executive Branch.[10]

In short, there is no violation of the principle of separation of powers when Congress acts to preserve the Executive Branch's access to executive papers and materials, and that is all that is involved at this stage of the operation of the Act. Nor, as we discuss immediately below, does the perhaps inevitable dis-

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[9] Appellant concedes that the Act "does not make the presidential materials available to the Congress—except insofar as Congressmen are members of the public and entitled to access when the public has it" (Br. 119).

[10] Section 105-63.401-2 of the Administrator's proposed public access regulations provides that the Senior Archival Panel of Executive Branch employees processing the materials shall, in limited circumstances, submit specific materials to a Presidential Materials Review Board for a determination whether the materials relate to abuses of government power or otherwise have general historical significance. Cf. 122 Cong. Rec. S5291 (daily ed., April 8, 1976). Two of the four members of this Board (the Librarian of Congress and a nominee of the Council of the Society of American Archivists) are not Executive Branch officials. This provision was disapproved by the House on September 14, 1976 (122 Cong. Rec. H10043-H10044 (daily ed., September 14, 1976)). If it or a similar provision becomes effective, Section 105 of the Act expressly authorizes a judicial action to determine whether such screening of materials by personnel outside the Executive Branch would offend the Constitution. There is no need for this Court to render an advisory opinion on that issue in this case.

closure of nonprivileged materials threaten interference with the operations or proper independence of the Executive Branch. Accordingly, appellant's contention that the public interest in preserving the materials is not sufficiently substantial to justify, or could not under any circumstances justify, a violation of the principle of separation of powers (Br. 102-121) is simply beside the point; no such violation has occurred or is threatened.

2. *The Act does not presage a wholesale invasion of the prerogatives of the Executive Branch*

Notwithstanding the fact that the Act is administered by the Executive Branch, that the incumbent President does not object to its provisions, and that all legitimate privileges are preserved by Section 104(a)(5), appellant argues that the Act is unconstitutional because it invades the autonomy of the Executive Branch to control its own affairs. This argument fails because its premise is false; with a possible exception not here relevant,[11] the Act does

[11] As the district court noted (J.S. App. 25a-26a n. 17), the constitutionality of Section 104(b), which authorizes a single House of Congress to disapprove regulations of the Administrator, is unsettled. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 140 n. 176. Cf. *id.* at 120-124, 137-141. At least in some forms, one-house veto provisions may well be unconstitutional attempts by Congress to participate in the detailed administration of a statute, which is fundamentally an Executive Branch function. See Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Cal. L. Rev. 983 (1975). The one-house veto provision, however, is not in issue here. The district court did not pass upon it, and appellant does not claim any right under the disapproved regulations.

not interfere with the constitutional prerogatives of the Executive Branch.

An Act of Congress does not invade the "autonomy" of the Executive Branch simply because it requires the Executive Branch to act in specified ways. The Constitution, which commands the President to "take Care that the Laws be faithfully executed" (Article II, Section 3), makes the President a servant of laws passed within the scope of a grant of power to Congress. Congress has frequently enacted measures providing for disclosure of documents in the possession of the Executive Branch. The Freedom of Information Act, 5 U.S.C. (Supp. V) 552, the Privacy Act of 1974, 5 U.S.C. (Supp. V) 552a, the Federal Records Act, 44 U.S.C. 2101 *et seq.*, and the statutes regarding census data, 13 U.S.C. 8-9, and tax returns, 26 U.S.C. 6103, are a few of many such acts. Legislation of this sort has never been considered a facially invalid invasion of the autonomy of the Executive Branch. Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73; *Administrator, Federal Aviation Administration* v. *Robertson*, 422 U.S. 255.[12]

[12] Appellant's analogy of presidential materials to judicial drafts (Br. 109-112) is not convincing. Each case reaching a court is a separate event, and only the opinion of the court is a precedent. But the situation with respect to executive papers is otherwise. The conduct of the Nation's government by the Executive Branch is a continuous process, in which unpublished documents may hold the key not only to proper historical understanding but also to successful conduct of ongoing affairs. As the district court put it (J.S. App. 52a-53a), "[g]overnmental programs and policies do not expire every

Like the documents governed by these statutes, presidential materials are an appropriate subject for legislation.[13] Since *Folsom* v. *Marsh*, 9 Fed. Cas. 342, it has been recognized that regardless of where legal title lies, the government's interest in disclosure or nondisclosure of presidential materials can take precedence over the desires of the authors. As Mr. Justice Story there noted (*id.* at 347), "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers."

Legislation regulating access to the materials from appellant's tenure as President is supported not only by the strong need for access by government officials to the materials but also by the need to have access for general historical purposes. For example, in carrying out their duties, officials of the succeeding administration found it necessary to review portions of the presidential materials from appellant's adminis-

four or eight years; the information and lessons gained from past experience do not evaporate the moment a new President is inaugurated." Procedures suitable for the records of individual jurists therefore may be quite intolerable if applied to executive officials.

[13] So are meetings by federal agencies. The Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241, adding 5 U.S.C. 552b, requires federal agencies to transact their business in open meetings. Although this may inhibit discussion to some extent, it would be difficult to argue that the Government in the Sunshine Act is a facially invalid invasion of the autonomy of the Executive Branch.

tration concerning SALT negotiations with the Soviet Union, our relations with the People's Republic of China, the Vietnamese negotiations concluded in 1973, and negotiations regarding the Middle East situation (A. 259-261). Some important documents, such as memoranda of conversations between appellant and foreign leaders, can be found only in the materials at issue here (A. 259, 261, 698-701). Far from constituting a breach of executive autonomy, the Act therefore is an appropriate means of ensuring that the Executive Branch will have access to the materials necessary to the performance of its duties.

Presidential materials, which by and large are produced by public employees at public expense, are affected at their creation by a public interest (*Folsom* v. *Marsh*, *supra*) that gives the Nation important rights to them. Congress is empowered by the Property Clause (Article IV, Section 3) to "make all needful Rules and Regulations respecting * * * Property belonging to the United States." Although the Property Clause would not enable Congress to override a legitimate claim of privilege, it establishes authority to legislate with respect to materials in which the United States has an interest.[14]

As a regulation of property affected by the public interest, the Act is constitutional without regard to

[14] "[D]eterminations under the Property Clause are entrusted primarily to the judgment of Congress" (*Kleppe* v. *New Mexico*, 426 U.S. 529, 536), and this Court has repeatedly given the Property Clause an "expansive reading" (*id.* at 539). See also J.S. App. 63a-66a n. 49.

whether appellant has a valid claim of ownership to the materials. Appellant's discussion of the tradition of presidential ownership of such materials (Br. 90-102) therefore is not pertinent.[15] To the extent that the Act interferes with any of appellant's property interests, Congress has exercised its power of eminent domain and provided for whatever compensation may be constitutionally necessary.[16] Use of the eminent domain power to acquire and preserve the historical record is proper. Cf. *Berman* v. *Parker*, 348 U.S. 26, 32; *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668. Once the materials have been so acquired, the Property Clause confers amply authority for their disposition under the Act.

We would have greater pause if the Act hindered the Executive Branch in carrying out its functions under Article II of the Constitution. The Executive Branch has a right to "autonomy" in the sense that Congress cannot so hamstring its operations in executing the laws that its ability to function as an

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[15] Appellant concedes that his alleged ownership interest may be subjected to some forms of legislative restriction, apparently without any requirement of compensation (Br. 121).

[16] We do not concede that the Act is a "taking." The Act preserves appellant's access to the materials. Although it may diminish their monetary value to appellant, that is not always enough to constitute a "taking." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590. This issue is not before the Court, however; appellant seeks not just compensation but full possession and control of all the materials at issue.

executive is frustrated.[17] Thus the Act would be open to question if it so threw open the process of decision-making in the Executive Branch that it became difficult for the President to obtain candid advice from the other Executive Branch officials, or for those officials to speak frankly to each other. Cf. *United States* v. *Nixon*, *supra*, 418 U.S. at 705-706, 715; *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149-155.

The Act does not create this sort of hazard, however; because it recognizes the importance of privacy and preserves existing privileges, and because the Executive Branch, acting through the Administrator, is entrusted with control of the day-to-day administration of the materials, we submit that the Act does not create such dangers of widespread breach of confidence that it is unconstitutional on its face. Any prospect of widespread breach of confidence can be detected, and rectified, when the Act is placed into operation. Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 68-72 (constitutionality of disclosure of names of contributors must be assessed case-by-case rather than on the face of the statute).

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[17] Appellant incorrectly relies (see, *e.g.*, Br. 103-108) upon *Buckley* v. *Valeo*, *supra*, *Myers* v. *United States*, 272 U.S. 52, and similar cases for the proposition that the Executive Branch is entitled to some broader scope of freedom from congressional interference. Those cases, however, involved only the President's power to select and dismiss officers of the United States, the persons who would execute the laws. They do not establish any limitation upon the power of Congress to prescribe substantive rules that properly appointed officers of the United States must follow.

B. The Act Does Not Breach Appellant's Privilege With Respect To Confidential Presidential Communications

The Act is consistent with the qualified privilege for confidential presidential communications, which, as this Court recognized in *United States* v. *Nixon*, *supra*, 418 U.S. at 715, is founded upon "the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article."

That privilege is based upon the harm that could be done to the decision-making process by public disclosure of confidential communications. It therefore does not pertain to all presidential materials (although an incumbent President may have other privileges with respect to other presidential materials), and it does not pertain to disclosure to incumbent officials of the Executive Branch. See *Folsom* v. *Marsh*, *supra*. The business of government requires that the President and other executive officials have access to the governmental papers of their predecessors. The privilege for confidential communications does not bar access by the Executive Branch to papers and materials generated by the Executive Branch for the use of the Executive Branch.[18] Indeed, the pur-

[18] Appellant asserts that *United States* v. *Nixon*, *supra*, recognized a presidential privilege that would bar access by an executive official. That is incorrect. *United States* v. *Nixon* involved a judicial subpoena for papers that were required to be used in the judicial process. The subpoena required the delivery of the materials to the court. In a very real sense, therefore, that case involved not only public access (the materials were to be introduced in evidence in open court) but also access by a separate branch of government. In its present posture, this case involves neither public access nor access by anyone outside the Executive Branch.

pose of the privilege is to facilitate the flow of information within the Executive Branch; it would be an ironic frustration of that purpose to permit the privilege to place each administration in a separate watertight compartment and thereby dam the flow from one administration to the next.

We do not imply that appellant has no presidential privilege. The district court expressed doubt (J.S. App. 39a-40a) whether a former President may assert a presidential privilege, but we do not share that doubt. This Court held in *United States* v. *Nixon*, *supra*, that the privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends. The confidentiality necessary to this exchange cannot be measured by the few months or years between the submission of the information and the end of the President's tenure; the privilege is not for the benefit of the President as an individual, but for the benefit of the Republic. Therefore the privilege survives the individual President's tenure.[19]

[19] For similar reasons, the attorney-client privilege survives disbarment of the lawyer and termination of the confidential relationship. It is for the benefit of the client, not for the

Furthermore, in view of the fact that the privilege serves societal, not individual, purposes, when a private person seeks access to presidential communications it should not matter whether the issue of privilege is raised by an incumbent President, a former President, or no one at all. The need for confidentiality exists no matter who raises the privilege.[20] Cf. Letter of Harry S. Truman to Harold H. Velde, dated November 12, 1953, reprinted at 120 Cong. Rec. 33419 (1974), in which former President Truman invoked a privilege of confidentiality after leaving office.

Our agreement with appellant in these regards, however, does not help him in the instant case. The privilege of confidentiality pertains to disclosures outside the Executive Branch, but not to disclosures within it. The President is a public trustee with inside knowledge and awesome responsibilities. He is answerable at the polls for his mistakes, and he is subject to political pressure from Congress. These

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benefit of the lawyer. There, as here, the free exchange of views can be promoted only by the promise of enduring confidentiality. See McCormick, *Evidence* § 94 (Cleary ed. 1972) (the privilege survives the death of the client in most cases). Cf. *Fisher* v. *United States*, 425 U.S. 391, 402-405.

[20] We discuss here only the privilege for confidential communications. As appellant himself acknowledges (Br. 81-90), a difference must be recognized between the privilege for state secrets and sensitive information, which may be raised only by the incumbent officeholder, and the privilege for confidential communications and pre-decisional advice, which may be raised by a former President.

things separate an incumbent from a former President, and they counsel against allowing a former President to stop up the flow of information to the incumbent and his staff. The government should not be required to start from scratch each time a new President assumes office.

At the present time, and for the foreseeable future, only appellant, officials of the Executive Branch in the conduct of their official duties, and archivists who will screen and classify the materials, have access to them. No access by the public is imminent, and before any such access is provided all materials will undergo a rigorous scrutiny designed to separate privileged matters (which will not be disclosed) from nonprivileged matters (which, if they are not private, will be disclosed under appropriate restrictions). Appellant has not made a persuasive argument that this screening process must lead to disclosures in violation of his privilege; indeed, it would be difficult to do so, in light of Section 104(a)(5)'s explicit preservation of his privilege.

Access by the archivists themselves is not meaningfully different from screening by a court *in camera*; it poses no realistic danger of breach of confidence or inhibition of discussions among executive officials. See *United States* v. *Nixon*, *supra*, 418 U.S. at 706, 714-716. See also *Department of the Air Force* v. *Rose*, 425 U.S. 352, 381-382 (*in camera* inspection, together with redaction of private details, will safeguard privacy); *Kerr* v. *United States District Court*, 426 U.S. 394, 404-406; *Dellums* v. *Powell*, C.A.D.C., No. 76-1336, decided January 28, 1977, slip op. 16-17.

Difficult questions still may arise concerning particular screening techniques and eventual public access to particular types of materials and subject matters, but consideration of these questions should not take place in the relatively abstract setting afforded by this case. A more concrete dispute, concerning particular techniques or subject matters, would provide a better perspective. The opinion of the district court manifests great solicitude for appellant's rights. It observes that access by nonarchivist executive officials to certain tyes of documents may be forbidden (J.S. App. 26a-27a n. 18) and that concern for appellant's rights must be "paramount" (*id.* at 22a); it suggests ways in which the screening of the materials can be accomplished with a minimum of intrusion (*id.* at 29a-31a).

There is no basis for appellant's apparent belief either that his legitimate interests will be overlooked if and when he seeks judicial review of the regulations governing screening and public access or that the presumption in favor of privilege has been reversed (Br. 69). The privilege is no more "reversed" by the Act than it is when a person attempts to secure materials, by subpoena, from appellant's hands. In either case appellant would be required to invoke his privilege; once it had been invoked, however, the burden would be on the proponent of disclosure.

In any event, only a small portion of the 42 million pages of documents and more than 800 reels of tape in issue could be subject to a legitimate claim

of privilege by appellant.[21] The privilege does not attach to materials unrelated to the performance of executive duties.[22] *United States* v. *Nixon*, *supra*, 418 U.S. at 703-714. Not even all materials related to the performance of executive duties are privileged; the privilege applies only to communications originating in confidence[23] and not yet disclosed to the public. Some of the materials have become matters of public record through appellant's voluntary disclosures and are no longer privileged. See, *e.g.*, 10 Weekly Comp. of Pres. Docs. 450 (1974). Between 16 and 20 hours of edited tapes were played at the criminal trial of four of appellant's aides. These tapes are no longer confidential. *United States* v. *Mitchell*, C.A.D.C., No. 75-1409, decided October 26, 1976, petition for a writ of certiorari pending *sub*

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[21] Appellant states that he is primarily concerned about the 200,000 documents that he personally prepared or reviewed (A. 514-516), and about "records of the 'internal operations' of a President's office" (Br. 13).

[22] Some materials unrelated to appellant's presidential duties may be subject to another privilege, such as attorney-client or husband-wife. But it may be anticipated that few of the documents are subject to such privileges, and it is impossible to determine which these are until the archivists have examined them.

[23] Appellant would define the scope of the privilege more broadly (Br. 70-73). But since much of the materials at issue would be unprivileged under any conceivable definition, and because public disclosure of even arguably privileged material is not imminently threatened, judicial resolution of this aspect of the disagreement between the parties must await a more concrete dispute, if one ever arises, involving a determination to disclose specified materials.

nom. Nixon v. *Warner Communications, Inc.*, No. 76-944. Most of the material therefore falls outside the scope of any recognizable privilege.

Finally, appellant cannot claim that all of the materials were created with the expectation that they would be kept privileged or private in perpetuity. Every President since Hoover has deposited most of his presidential materials in a library pursuant to the Presidential Libraries Act, 44 U.S.C. 2101, 2107 and 2108 (see J.S. App. 43a). Only a few presidential materials have been withheld. Each President or his representative has allowed professional archivists to screen the materials and to suggest appropriate restrictions upon access; appellant had planned to follow a similar course (A. 182-184). The sheer bulk of the materials would make any other course infeasible (J.S. App. 72a, 83a n. 59). With or without the Act, then, eyes other than appellant's would screen most of the materials and separate the public from the private, the privileged from the unprivileged, the sensitive from the mundane.

C. The Act Is Not A Bill Of Attainder

Bills of attainder are "legislative acts, no matter what their form, that [1] apply either to named individuals or to easily ascertainable members of a group [2] in such a way as to inflict punishment on them [3] without a judicial trial * * *." *United States* v. *Lovett*, 328 U.S. 303, 315; *United States*

v. *Brown*, 381 U.S. 437, 448-449.[24] Noting that Title I of the Presidential Recordings and Materials Preservation Act applies only to the presidential materials of his administration and refers to him by name, appellant argues that the Act is a bill of attainder (Br. 130-141). The Act, however, lacks two necessary elements of a bill of attainder: it does not inflict punishment, and it does not encroach upon the judicial function.

That Title I of the Act refers to appellant by name and applies only to his presidential materials does not render the Act unconstitutional.[25] As the district

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[24] At common law, "bills of attainder" imposed the death sentence, while legislative acts imposing lesser sanctions were known as "bills of pains and penalties." The Constitution proscribes bills of attainder and bills of pains and penalties alike. *United States* v. *Brown, supra*, 381 U.S. at 441, 447; *Cummings* v. *Missouri*, 4 Wall. 277, 323.

[25] This Court's equal protection decisions show that a legislature can constitutionally address specific problems directly. See, *e.g.*, *City of New Orleans* v. *Dukes*, No. 74-775, decided June 25, 1976; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Congress also can attack a problem piecemeal. See, *e.g.*, *Mathews* v. *DeCastro*, No. 75-1197, decided December 13, 1976; *Dandridge* v. *Williams*, 397 U.S. 471. The test of validity under equal protection principles is whether the classification is rationally related to the problem at hand. *Weinberger* v. *Salfi*, 422 U.S. 749, 768-769. These precepts apply to the Act at issue no less than to broad social welfare measures such as the Social Security Act, and the decision by Congress to address in detail the problems of the disposition of appellant's papers therefore comports with equal protection principles. Appellant apparently concedes this much, for he has abandoned his former argument (J.S. 28) that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment.

court observed (J.S. App. 93a-94a), appellant's status and the materials of his administration are unique. Appellant, alone among all Presidents, resigned in the face of impending impeachment by the House of Representatives; indeed, the allegations against him were sufficiently serious that after his resignation appellant accepted a pardon for all crimes he may have committed while in office. The circumstances leading to the recommendation by the House Judiciary Committee that appellant be impeached cast a pall over his conduct in office. The materials of his administration are "peculiarly informative" (J.S. App. 58a) with regard to these unusual circumstances and therefore are especially fit for historic preservation.

Other more mundane things also set appellant apart. When Congress acted, the presidential papers of all other recent past Presidents were already available in presidential libraries, former President Ford, then the incumbent, needed his presidential papers to carry out his duties,[26] and the papers of future Presi-

[26] On December 13, 1976, President Ford donated his presidential, vice-presidential, and congressional materials to the United States for preservation in a presidential library and museum. 12 Weekly Comp. of Pres. Docs. 1709 (1976). The deed provides for the prompt processing of all materials by archivists, and Mr. Ford did not retain any power to select them or influence their conduct (*id.* at 1712-1713). Specified personal items, however, are excluded from the gift (*id.* at 1711), and Mr. Ford restricted access (except by archivists) to designed classes of materials such as personnel investigations, confidential communications, and classified materials (*id.* at 1713).

dents posed no immediate problem. Moreover, Title II of the Act establishes a special commission to study and recommend appropriate legislation regarding the preservation of the records of future Presidents and all other federal executive, legislative, and judicial officials.

Congress considered bills that would have governed the papers of all federal officials. 120 Cong. Rec. 33855, 33857-33863, 37902 (1974). That approach was rejected, however, after sponsors of the Act emphasized the urgency of the situation regarding appellant's materials. Members of Congress also pointed out differences between a President's and a legislator's papers; they expressed concern about the fact that the costs of a statute applicable to all officials were unknown. 120 Cong. Rec. 33857, 33959, 33962, 37902 (1974) (remarks of Senators Nelson and Ervin and Representative Brademas).

Congress believed that it should act promptly with respect to appellant's presidential materials; in the view of the responsible committees, appellant's depository agreement with GSA created an imminent danger that the tape recordings would be destroyed if appellant, who had contracted phlebitis, were to die. S. Rep. No. 93-1181, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. 2-3 (1974); 120 Cong. Rec. 33874 (1974) (remarks of Senator Huddleston).[27] In addition, several legis-

[27] There was some confusion whether the depository agreement (A. 41) called for the destruction of the tapes immediately upon appellant's death or only upon his death more than

lators believed that Congress should act promptly to overcome the "greatly lower public confidence in our Government" attributable to the events that almost led to appellant's impeachment. 120 Cong. Rec. 33873 (1974) (remarks of Senator Cranston); 120 Cong. Rec. 33875 (1974) (remarks of Senator Huddleston).

The Act Congress designed to cope with these pressing problems lacks the punitive intent that is an essential element of a bill of attainder. The Act does not contain an express declaration of guilt, nor does it impose a punitive sanction. Cf. Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Cal. L. Rev. 212, 214 (1966).

Appellant asserts that the Act is punitive because it has deprived him of ready access to his presidential materials and because the materials are to be processed by archivists whom he has not selected (Br. 104). Under appellant's depository agreement with GSA, however, appellant willingly surrendered access to the materials for an initial three years (five years in the case of the tape recordings), except through a two-key system under which the consent of the Administrator was necessary (J.S. App. 135a). The Act (Section 102(b)), and its implementing regulations (41 C.F.R. Subpart 105-63.2, 105-63.301), do not deprive appellant of substantial

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five years after the initial deposit. Cf. Appellant's Br. 15[illegible] n. 69.

rights of access preserved in the depository agreement; to the contrary, they ensure appellant's right of access to the materials, including his right to obtain copies on request (see J.S. App. 13a, 107a). The latter provision minimizes any inconvenience to appellant that might otherwise arise from the fact that the materials are stored in the Washington, D.C., area rather than in California, as the depository agreement had envisaged.

Even if the Act were seen as imposing discomfort or inconvenience, this would not make it a bill of attainder.

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation * * *.

Flemming v. *Nestor*, 363 U.S. 603, 614, quoting from *De Veau* v. *Braisted*, 363 U.S. 144, 160 (plurality opinion). The legislative history of the Act demonstrates that it is a regulatory statute designed to preserve, process, and make available, with appropriate limitations, the materials relating to appellant's Presidency. S. Rep. No. 93-1181, *supra*, at 1; H.R. Rep. No. 93-1507, *supra*, at 1.[28] The object

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[28] Some members of Congress who opposed the Act characterized it as a bill of attainder or a punitive measure. *E.g.*, 120 Cong. Rec. 33871, 33963, 33968, 33975 (1974) (remarks of Senators Hruska, H. Scott, Thurmond, W. Scott). Those

"on which the enactment in question was focused" (*Flemming* v. *Nestor*, 363 U.S. 603; see also *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169), was the legitimate concern relating to the materials of appellant's Presidency. Congress was not seeking to punish him.[29] See J.S. App. 100a.

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who sponsored or supported the Act, however, expressly disavowed that purpose. *E.g.*, 120 Cong. Rec. 33872, 33959, 33874-33875 (1974) (remarks of Senators Ervin and Huddleston). For example, Senator Huddleston stated (120 Cong. Rec. 33875 (1974)):

> I[t] seems to me that the most important thing we can do in the aftermath of a tide of events that led to the resignation of a President of the United States and numerous indictments and convictions of high public officials is to assure that the American people know the complete story—not just the present generation, but all generations to come.
>
> It should be made clear that this proposed legislation is not designed to cause Mr. Nixon any additional embarrassment, humiliation or suffering. In my opinion his resignation from the highest office of the land has been substantial punishment in itself and we should not seek to inflict more. This is why the pending legislation affords the former President every protection and consideration while at the same time protecting the right of the public to be completely informed about a matter that affects us all so intimately.

[29] Appellant argues that the Act effectively punishes him because it will compel him to devote time and money to making arguments (both to the Administrator and in court) designed to avert disclosure of private or privileged matters. He contends, in short, that he has been condemned to become a continual litigant. Although we do not gainsay the hardship such a status may entail, we believe that here, too, appellant's arguments are premature. Once regulations have been promulgated and the process of classification has begun,

The Act also lacks a further element of a bill of attainder, a "trial by legislature." *United States* v. *Brown*, *supra*, 381 U.S. at 442. Section 105 of the Act expressly provides for judicial determination of whether the Act deprives any individual of property and, if so, what amount should be paid as just compensation. Section 104(a)(5) preserves appellant's privileges, and any question concerning their applicability can, if necessary, be resolved by a court. Section 104(a)(7) protects appellant's right to purely personal materials; Section 102(c) ensures his access to all of the materials. These provisions, and others that safeguard appellant's interests,[30] refute the claim that the Act supplants the judicial process in the manner of a bill of attainder.

Appellant's argument that the Act is a bill of attainder would appear to reach every legislative exercise of the power of eminent domain over specifically designated property of a specific individual. In each

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it may become clear that appellant and the Administrator agree on the proper disposition of many categories of materials. In any event, appellant would have faced the need to litigate many of his claims of privilege and privacy whether or not the Act had been passed. Several suits seeking access to the materials had been filed (see pages 6, 10, *supra*), and appellant would have been required to raise his privilege and privacy arguments in defense to these and other suits, subpoenas, and requests for discovery.

[30] See, *e.g.*, Section 102(b), which preserves all of appellant's "rights, defenses, or privileges" in any judicial proceeding involving a subpoena of the materials.

case there is a legislative assertion of control over property on the basis of legislative determinations of fact and purpose. But an Act of Congress expressly providing for a judicially-computed award of "just compensation" for any property interest taken cannot be thought to be either an invasion of the province of the judiciary or an imposition of penalties.

For example, the Act appellant challenges is functionally little different from the statute upheld in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, which provided for the transfer of the railroad properties of a small number of railroad companies to a governmentally organized corporation. No one supposed that that statute was a bill of attainder. Neither is the Act involved here. Indeed, to the extent the statutes can be distinguished, the present Act effects the lesser intrusion: Congress simply has placed conditions on the authority of the Administrator of General Services to release materials that were generated by and are in the possession of the United States, and appellant ultimately will be given the materials or facsimiles.

In contending that the Act unconstitutionally invades the province of the judiciary, appellant argues that the Act makes the implicit determination that he would be an unreliable custodian of the materials, and that such a finding can be made only by a court (Br. 137). It is true that, in debating the Act, legislators reviewed the Watergate events, including the 18½ minute erasure in the June 20, 1972, tape made

while appellant had custody of the recordings, the discrepancies between appellant's transcripts of the recordings and those of the House Judiciary Committee, and the fact that appellant had been named by a grand jury as an unindicted conspirator. See, *e.g.*, 120 Cong. Rec. 33859, 33958, 33959 (1974) (remarks of Senators Javits and Ervin). These factors, however, were relevant to the legislative task of determining how best to safeguard the materials. The very fact that questions had arisen concerning appellant's reliability as a custodian [31] made it reasonable for Congress, in the exercise of caution, to preserve the Executive Branch's control over the original materials and to provide for their processing by disinterested archivists.

In sum, although the Act specifies appellant by name, Congress was acting to resolve a situation unique to him and the materials of his presidency.[32]

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[31] Appellant's argument that only the courts may determine whether he would be a reliable custodian rings hollow in light of his responses at the deposition taken in the present case. When appellant was asked whether he had deliberately misrepresented in his public statements as President the contents of the tape recordings, he refused to answer, invoking a claim of privilege and asserting that the question was irrelevant (A. 581-590).

[32] *United States* v. *Lovett*, *supra*, does not support appellant. In *Lovett* the Court held that a statute removing from government employment three persons designated by name was a bill of attainder. The statute at issue in *Lovett* was intended to bypass the judicial process by branding the three persons as subversives and penalized them for their past ac-

The Act lacks the punitive design and consequences, and the invasion of the judicial function, that are essential elements of a bill of attainder.

D. Review Of The Materials By Archivists Does Not Invade Appellant's Privacy

Appellant renews his arguments, rejected by the district court (J.S. App. 67a-93a), that the Act invades his privacy and abridges his freedom of expression and association. We discuss these in turn.

Appellant was, for the term of his Presidency, the quintessential "public figure." See, *e.g.*, *Monitor Patroit Co.* v. *Roy*, 401 U.S. 265; *New York Times Co.* v. *Sullivan*, 376 U.S. 254. His voluntary decision to seek the Presidency relinquished any "privacy" interest in the way he conducted that office and administered the public trust. See *Uniformed Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280, 284.

A former President may have a "privacy" interest in some of his documents, but that interest would pertain to only a few of the materials in issue here. Most of the papers were prepared or seen by others; many were circulated widely within the government,

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tivities. For the reasons discussed in the text, the Presidential Recordings and Materials Preservation Act does not have these features. In it, Congress simply expressed a judgment that the *materials* accumulated during appellant's terms should be preserved; any judgment it expressed about appellant was incidental to this end, and specifying appellant by name was simply a convenient way of designating the materials sought to be preserved.

and appellant would have no privacy interest in them. *United States* v. *Miller*, 425 U.S. 435. Appellant himself prepared or reviewed relatively few of the documents. Portions of some of them have been disclosed or discussed in public and therefore no longer are private. See *United States* v. *Dionisio*, 410 U.S. 1, 14; *Katz* v. *United States*, 389 U.S. 347, 351.

Appellant expected to donate most of his materials to a presidential library, where they would be screened by archivists and read by historians and members of the public. Appellant's principal purpose in making the tape recordings was to preserve the conversations for historical purposes (A. 562-563), a purpose that could be fulfilled only by allowing individuals other than appellant to have access to them. The nature of the tapes and most of the documents, and the purpose of their creation, thus demonstrate that as to them the Act does not invade an area in which appellant had an expectation of privacy.

Whatever "privacy" interest appellant may have in the remaining materials (such as communications to and from his family) is insufficent, in light of the strong public interest in preservation of most of the nonprivate materials, to bar archivists from reviewing all the materials initially for the narrow purpose of separating the public from the private.

The substantiality of the interests served by preservation of the materials is self-evident. We have discussed the need of officials of the Executive Branch to have access to the materials in order to

conduct the affairs of state. The Act also ensures that materials of historical significance will be preserved and professionally processed in order to make available an accurate historical record (J.S. App. 49a-52a), and it ensures that materials will be preserved for use in judicial proceedings (Section 104 (b)).

Congress reasonably perceived that these and other legitimate public interests would be jeopardized if appellant had the sole right to screen the materials and to separate the private from the public. For one thing, appellant's view of what is "private" may be more generous than that which would be taken by Congress, the Executive Branch, or a reviewing court. Use of disinterested archivists to do the screening leads to the application of generally uniform standards; if the archivists use incorrect standards, their errors may be corrected by a court.[33] If appellant alone had access to the materials, however, no correction of errors could occur.

Congress also was concerned about the possibility of other sorts of errors or distortions during the sorting process. For example, during the time appellant had custody of the tape recordings an unexplained 18½ minute erasure was made in one tape sought by the Special Prosecutor. 9 Weekly Comp.

[33] Appellant's argument (Br. 174-177) that archivists are not judges and cannot be relied upon to protect his privacy is beside the point. If it is deemed necessary, the archivists' decisions will be reviewed by a judge or judges, and the appropriate legal standard of privacy will be judicially enforced.

of Pres. Docs. 1370, 1372 (1973); H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 127 (1974). During the hearings on the proposed articles of impeachment appellant released documents that he represented to be transcripts of the taped conversations. 10 Weekly Comp. of Pres. Docs. 450-458 (1974). After the House Judiciary Committee obtained the recordings, it concluded that appellant's transcripts had "proven to be untrustworthy" and contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention * * *" (H.R. Rep. No. 93-1305, *supra*, at 205, 129).

Congress took pains to establish a mechanism to mitigate the problems caused by the archivists' review of genuinely private materials. The Act acknowledges the need to give appellant "sole custody and use" of all materials not related to the abuses of power generically referred to as "Watergate" and not of general historical significance (Section 104(a)(7)).[34] The initial screening will be conducted by disinterested archivists; screening of this sort, like submission of materials to a court *in camera*, does not

[34] Appellant asserts (Br. 143-145) that the Administrator will construe Section 104(a)(7) in a way that fails to recognize appellant's legitimate privacy interests. This assertion does not, however, establish that the Act is unconstitutional on its face. Improper decisions by the Administrator may be attacked as violations of the Act, without resort to constitutional arguments. Moreover, when there is need to do so, the Court should construe the Act in a way to save its constitutionality and not, as appellant seemingly contends, in a way to defeat its constitutionality.

create a significant invasion of privacy. *Department of the Air Force* v. *Rose*, *supra*.

To the extent screening by the archivists is itself an invasion of privacy, the intrusion is attributable in part to appellant's practice of commingling public and private documents (see J.S. App. 63a). He should not now be entitled to claim that the statute is unconstitutional on its face because the archivists, "whose record for discretion in handling confidential material is unblemished" (*id.* at 45a),[35] will be required to sift through private documents.[36]

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[35] Appellant suggests (Br. 174-177), but does not expressly argue, that this finding by the district court is clearly erroneous. It is not. The finding is amply supported by the record (*e.g.*, A. 232-235, 245-246, 264, 266-267, 346-347), and appellant cites no record evidence of any past abuses of confidentiality by archivists. Indeed, Dr. Herman Kahn, upon whom appellant relies (Br. 31-32), testified at the hearings on an alternative bill to the Act:

> [S]ince 1945 the papers of the Presidents have become the property of the Government immediately upon the President's leaving the White House and it has been the responsibility of the appropriate officials of the Government to see that no one lays hands on them who might do them harm. I think that responsibility has been very faithfully carried out.

Hearings on H.R. 16902 and Related Legislation before the Subcommittee on Printing of the Committee on House Administration, 93d Cong., 2d Sess. 97 (1974).

[36] Appellant argues that this sifting violates the Fourth Amendment (Br. 147-164, 173-174). This argument overlooks the fact that the materials always have been, and still are, in the lawful possession of the United States. They never were seized from appellant within the meaning of the Fourth

Finally, as is the case with appellant's other arguments, more particularized claims can be made once the regulations have become effective and initial de-

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Amendment. *Couch* v. *United States*, 409 U.S. 322, 335-336. Accordingly, appellant's effort to analogize the Act to a general warrant (Br. 147-152) is mistaken, and his reliance upon *Sanford* v. *Texas*, 379 U.S. 476, erroneous. Moreover, the proscription of general warrants would not in any event extend to a governmental assertion of a possessory interest subject to the safeguard of just compensation.

Appellant contends that, if the materials were in his hands, the government could not obtain all of them by subpoena (Br. 151-152). This might well be so, but in light of the special public interest that affected the materials at their creation and the fact that most of them were generated by government employees, the Fourth Amendment standards of reasonableness that apply to subpoenas served upon private persons would not apply: there should be no need to establish reasonableness before personnel of the Executive Branch may examine documents created by the Executive Branch itself. Ordinarily the Self-Incrimination Clause of the Fifth Amendment would be the most important safeguard against intruding subpoenas, but it would apply only when the act of production was itself a testimonial act. See *Fisher* v. *United States*, *supra*. The Self-Incrimination Clause does not apply to appellant's materials, however, because he has been pardoned for all crimes he may have committed as President, and the materials therefore cannot incriminate him.

Furthermore, neither the Fourth nor the Fifth Amendment prevents officials of the government from seizing and searching through documents to find that which they seek. *Andresen* v. *Maryland*, No. 74-1646, decided June 29, 1976 (upholding a comprehensive examination of an attorney's files to find papers related to a specified fraudulent transaction). Appellant observes that the inspection under the Act is not a search for evidence of a particular crime, but that does not help him. Searches can be conducted to find out whether crimes (or civil violations of regulations) have occurred in the first place. See *United States* v. *Biswell*, 406 U.S. 311. In *Biswell* the Court

terminations are made with respect to what is private and what is public. "Objections [appellant] now presses might be mooted by regulations that protect the very rights whose infringement he now alleges; hypothetical horrors paraded before us as abstract possibilities might never come to pass * * *" (J.S. App. 21a). There will be time enough for further consideration of appellant's privacy claims if it should become clear that the archivists are abusing their offices, or if the Administrator should designate as "public" any category of materials that appellant believes are "private."

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upheld a warrantless entry upon private property to make an inspection of business records and inventory to determine whether the proprietor was complying with a federal statute; contrary to appellant's suggestion (Br. 163), that thorough inspection of the sole proprietor's records and storeroom was neither "modest" nor "impersonal." See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72; *Wyman* v. *James*, 400 U.S. 309. The decisions in *Biswell*, *Colonnade* and *Wyman* were based upon the special relationship between the government and the premises visited. In the instant case there is an even stronger relationship between the government and the papers inspected: with only minor exceptions, they are government documents, created with federal money. Thus even if they had not been held in the possession of the Executive Branch, they could constitutionally have been searched by Executive Branch officials in order to secure and preserve those materials of value and legitimate concern to the government. *A fortiori* they are subject to such search when voluntarily left in the custody of the Executive Branch.

E. The Act Does Not Abridge The Freedoms Of Speech And Association

The arguments demonstrating that the Act does not invade appellant's privacy also demonstrate that it does not abridge his freedoms of speech and association. The district court therefore properly rejected appellant's First Amendment contentions (J.S. App. 89a-93a). "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 64. This Court has recognized, however, that "particularly when the 'free functioning of our national institutions' is involved," the need for disclosure may outweigh the First Amendment interests. *Id.* at 66, quoting from *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 97.

Appellant's conversations and documents were not those of a private citizen. His interest in speech is affected by his status as a public servant (*Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548), and the cases upon which he relies (Br. 164-173) therefore apply here, if at all,[37] with substantially diminished force. Moreover, as we have discussed, the Act will allow public access only to those mate-

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[37] Indeed, many of the cases upon which appellant relies involve governmental restrictions upon or prohibition of public expression. See, *e.g.*, *Cox* v. *Louisiana*, 379 U.S. 536; *Lovell* v. *Griffin*, 303 U.S. 444. No such restriction or prohibition is involved here.

rials related to "Watergate" or having general historical significance.[38]

The initial screening of all the materials by disinterested archivists does not infringe appellant's First Amendment rights. The private knowledge of the archivists will pertain only to past events, and that knowledge should not deter appellant from expressing himself in the future concerning public issues; it could not prevent other individuals from associating with appellant (J.S. App. 92a-93a). Nor should such a mere screening chill the discussions of public servants in the current or future administrations: the privilege against disclosure of confidential communications, which comes into play only after the archivists' initial review, is sufficient to protect against any chilling effect on future intra-governmental communications.

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[38] Appellant argues (Br. 121-130) that the Act is "overbroad" because it will entail publication of other matters as well. But it is far too early for this Court to pass upon that contention. The regulations eventually promulgated, and judicial review of those regulations and the decisions made under them, can narrow the effect of the statute and avert improper disclosures. Such narrowing constructions and administrative practices were relied upon in cases like *Parker* v. *Levy*, 417 U.S. 733, and *Civil Service Commission* v. *Letter Carriers*, *supra*, to save statutes against claims of overbreadth. Similarly, in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 64-74, the Court concluded that although a broad disclosure requirement might on some occasions inhibit speech and association, such claims must be resolved case-by-case rather than in one blunderbuss attack. And so it is here; if disclosure of particular materials or classes of materials would have a particular adverse effect upon appellant's interests, such questions can be resolved when and if they arise.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

—v.—

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

BRIEF FOR INTERVENOR-APPELLEES, LILLIAN HELLMAN, *et al.*

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* The intervenor-appellees include Lillian Hellman, John Hersey, Telford Taylor, Robert Silvers, Norman Dorsen and four other members of the executive board of the Committee for Public Justice, a group of writers, lawyers, historians and others concerned about the civil rights and liberties of the American people.

OPINIONS BELOW

The opinion of the three-judge court (J.S. App. 1-106a)[1] is reported at 408 F. Supp. 321. The opinion of Judge Richey in the "consolidated cases" (discussed below) is reported sub nom. Nixon v. Sampson, at 389 F.Supp 107 (D.D.C. 1975), judgment stayed, 513 F.2d 427 and 430 (D.C. Cir. 1975) (J.S. App. 139a-202a). The latter opinions also deal with the convening of the three-judge court below.

JURISDICTION

The judgment of the three-judge court was entered on January 7, 1976. A notice of Appeal was filed on March 4, 1976 and appellant's jurisdictional statement was filed May 3, 1976. This Court noted probable jurisdiction on November 29, 1976. The jurisdiction of this Court rests upon 28 U. S.C. §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 3, Clause 2 of the Constitution.

The First and Fourth Amendments to the Constitution.

Title I of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695

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1. "J.S. App." refers to the Appendix to the Jurisdictional Statement.

et seq., 44 U.S.C. §2107 note and §§3315-3324 (Sup. IV, 1974) is set out in Appendix I to Appellant's Brief.

QUESTIONS PRESENTED

1. Does Congress have the constitutional power to enact legislation broadly preserving from destruction 42 million documents and various tape recordings of the Executive branch in order to insure continuity of government, preserve an accurate historical record and provide public access to government records showing possible abuse of power by an ex-President.

2. Does an ex-President have an expectation of privacy with respect to governmental records he never saw or to other governmental records showing his use of governmental power.

3. Does the fact that, contrary to regulations, an ex-President intermingled a tiny fraction of personal papers with a vastly greater quantity of records bearing on the performance of public duties and the exercise of governmental powers entitle that ex-President to exclusive personal custody and control over all such records.

4. Is the Presidential Recordings and Materials Preservation Act unconstitutional as an invasion of an ex-President's Fourth and First Amendment rights despite the fact that all private papers relating to his personal affairs or the exercise of First Amendment rights will be returned to him and will not be made public.

5. Can professional archivists, expert and experienced in screening and properly classifying government and archival records, be legitimately entrusted with the task of sorting out private materials of Mr. Nixon and returning them to him.

STATEMENT OF THE CASE

A. Background to This Action

Former President Richard M. Nixon resigned his office on August 9, 1974 following various disclosures about his role in the Watergate affair that would almost assuredly have meant his impeachment and removal from office. A month later, on September 8, 1974, Mr. Nixon signed an agreement with the then Administrator of General Services, Arthur F. Sampson, purporting to grant Mr. Nixon ownership and possession of 42 million documents collected by the White House in the five and one half years of his Presidency. In addition, 880 tape recordings of conversations (covering the period from February, 1971 to July, 1973) occurring in his two White House offices, in his study at Camp David and on some of his telephones (App. 218) were also covered by the agreement. The agreement allowed Mr. Nixon to destroy all the documents involved after September, 1977 and all the tapes after September, 1979 or at the time of his death, whichever first occurred.

One reason for the transfer was later offered by former Presidential counsel Philip W. Buchen. He noted that after August 9, 1974, the White House was forced to respond to many subpoenas and requests for access to the Nixon Presidential materials, and White

House officials found that continued custody of the Nixon Presidential materials was "quite burdensome." Deposition of Philip Buchen, Nixon v. Sampson, Tr.I at 11.

Shortly after the agreement was signed, the Watergate Special Prosecutor protested, claiming that the material covered by the Nixon-Sampson agreement was needed by his staff for its investigations. As a result, the Ford administration refused to implement the Nixon-Sampson agreement. Mr. Nixon then brought suit on October 17, 1974 to enforce the agreement and obtain the materials. (Nixon v. Sampson, C.A. No. 74-1518, D.D.C. filed October 17, 1974). Thereafter, the Reporters Committee for Freedom of the Press and other professional organizations and individual reporters, historians and writers brought suit to invalidate the agreement. (Reporters Committee for Freedom of the Press v. Sampson, C.A. No. 74-1533, D.D.C. filed October 21, 1974). In addition, Lillian Hellman and other writers, lawyers and historians belonging to the Committee for Public Justice brought an action under the Freedom of Information Act to secure access to certain tapes in the Nixon materials and to test the validity of the Nixon-Sampson agreement. (Hellman v. Sampson, C.A. No. 74-1551, D.D.C. filed October 24, 1974). Jack Anderson, the newspaper columnist, intervened in the Nixon v. Sampson case as did the Special Prosecutor. The three cases were then consolidated and have been called the "consolidated cases" throughout this litigation.

While various motions were pending in the consolidated cases, Congress passed the law at issue here, the Presidential Recordings and Materials Preservation Act, (hereafter "the Act"), P.L. 93-526, 88 Stat. 1695 (Decem-

ber 19, 1974). On the following day Mr. Nixon filed this action seeking declaratory and injunctive relief against enforcement of the Act on a variety of constitutional grounds. The Reporters Committee, Jack Anderson and Miss Hellman, et al., moved to intervene in light of their FOIA claims in the consolidated cases.

Thereafter, on January 31, 1975, Judge Richey handed down his opinion in the consolidated cases, Nixon v. Sampson 389 F.Supp. 107 (D.D.C. 1975), stating that former President Nixon did not own the Presidential materials covered by the Nixon-Sampson agreement and that only the current President and not any former President could assert executive or presidential privilege with respect to communications contained in the materials. On petition for a writ of mandamus, the Court of Appeals for the District of Columbia stayed entry of any order in Nixon v. Sampson, until the district court passed upon the application for a three-judge court in the instant action. Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975). Thereafter the stay was continued, not because any appeal court or later district court disputed any of Judge Richey's conclusions, but only because the court of appeals held that an action challenging the constitutionality of the Act had to take precedence over the consolidated cases.

In May, 1975, the court below determined it was properly convened, continued the stay in the consolidated cases, granted the pending motions for intervention and established a briefing and argument schedule (App. 123-5). The case was argued on September 25, 1975, and decision handed down on January 7, 1976.

B. The Act

Section 101 of the Act directs the Administrator of General Services to obtain and retain possession and control of all of the presidential historical materials and tape recordings from appellant's administration. Mr. Nixon's agreement with GSA is abrogated (Section 101(b)). Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke * * *." Section 102(c) and (d) provides that Mr. Nixon (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.

Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104(a)):

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating

to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 104(b) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes can be disapproved by a resolution of either House within 90 legislative days of submission.[2] Section 105 pro-

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2. The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed. September 11, 1975). The Administrator has not sought to enforce these disapproved regulations, and no party to this litigation claims any rights under them. The second set was withdrawn; the Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. S5290-S5291 (daily ed. April 8, 1976). The third set was submitted on April 13, 1976, and is pending.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. 105-63. The district court has enjoined the effectiveness of some of these regulations pending disposition of this case (J.S. App. 107a-108a).

vides for "just compensation" to any individual who may have been deprived of private property by the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed, has held hearings, but has not yet submitted its report; it is not involved in this litigation.

C. The Decision Below

The court below considered the validity of the Act on its face, in light of the fact

that final regulations had not yet been promulgated and accepted by Congress and that Mr. Nixon has the right of judicial review of the regulations when adopted. Thus, the court concluded, the only interest of Mr. Nixon that could be endangered by the Act itself is the necessity of screening of the materials by professional archivists once the regulations come into force. The court found that the Act by its own force does not require public disclosure of any particular document or tape and that the regulations when adopted might eliminate any intrusion into constitutionally protected rights. Thus, it held that the governmental interests justifying the Act outweighed the hypothetical dangers to Mr. Nixon's interests.

The court rejected Mr. Nixon's argument that the Act invaded the separation of powers between the three branches of government. The only prerogative of the Executive branch that could conceivably be affected here is the possible threat to confidentiality in rendering advice to the President. But this interest could involve only a tiny percentage of the materials at issue here (Mr. Nixon admitted that he had personal involvement in only about 200,000 of the 42 million documents covered by the Act. App. 516). The court did not reach the question of whether an ex-President can claim executive or presidential privilege. But assuming there is some privilege, the court said it is not as forceful as one raised by an incumbent President. Given the fact that only a small percentage of the 200,000 documents and not all of the tapes would qualify for the type of limited privilege which might exist in this situation, the danger to confidentiality from the limited screening by archivists that might be involved

could not significantly invade the separation of powers. Such screening has been done for almost all the Presidential libraries since Herbert Hoover's time. The court concluded that the interests of Congress in maintaining a complete and accurate historical record and assuring the continuity of government records for those now in the White House more than outweighed any interest of Mr. Nixon's.

The court below also rejected any Fourth Amendment claim of Mr. Nixon based on his expectation of privacy in the bulk of the materials. If Mr. Nixon saw only 200,000 documents the court said "we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private." (J.S. App. 69a) Similarly, tape recordings in the two White House offices and his study at Camp David must "relate primarily to the conduct of the presidency." (J.S.App. 71a) Thus his privacy interest in the tapes must be quite small. Although it was likely that some of Mr. Nixon's private conversations may be screened by archivists, the lower court found that no Fourth Amendment violation would occur because such a search would be "reasonable." (J.S. App. 87a) The court noted that many private conversations are "seized" under Title III of the Omnibus Crime Control and Safe Streets Act when a wiretap is installed on a private telephone. The fact that some invasions of personal privacy occur which are unrelated to criminal activity that served as the basis for a warrant has been held not to render a wiretap unreasonable under the Fourth Amendment. (J.S. App. 79a-81a) The court also noted that administrative searches do not have all the protections of searches under the criminal law. (J.S. App. 75a, n.56)

Mr. Nixon's First Amendment claims were also found to be without foundation. Even with the broadest possible definition of his rights in this area, the court found that the limited intrusion by archivists will not impair Mr. Nixon's right to express himself in public or to associate with others in political activity. (J.S. App. 89a-93a)

Finally, Mr. Nixon's equal protection claim and his bill of attainder argument were also rejected by the court below. The court found that the papers of all of Mr. Nixon's predecessors as President had already been deposited in government libraries. (And since that decision, Mr. Ford has continued the tradition by donating all his papers to the government even before he left office, so there was continuous federal control of the documents of his presidency. See 12 Weekly Compilation of Presidential Documents, 1709-18 (December 20, 1976)). Since his papers "were in a unique status," (J.S. App. 93a) Congress could legislate with respect to them without violating the equal protection or bill of attainder clauses.

D. Materials at Issue

The materials involved in this litigation include all the 42 million documents and records sent to, collected in or generated by the White House under President Nixon from January 20, 1969 to August 9, 1974. Mr. Nixon informs us that a major portion of this material -- 7.3 million pages -- consist of birthday, anniversary and other greetings to Mr. Nixon and his family, public opinion mail and extra sets of GPO publications. (Appellant's brief at 25) Another large group of

documents -- 11.4 million pages -- are duplicates of communications among the Executive departments and permanent copies are still to be found in the files of the State Department, Treasury Department and so on. Of the 24 million documents remaining, only 200,000 were personally reviewed by Mr. Nixon. (App. 516) The other documents consist of the work product of the White House for five years, virtually the entire range of activity of the Executive branch of government. These would include the files of the various components of the Executive Office: the National Security Council, the Domestic Council, the Economic Policy Board, the Energy Resources Council, and the Council on International Economic Policy, as well as material from some of the other organizations such as the Council of Economic Advisers, the Office of Management and Budget, and others. (Affidavit of William Matthews, App. 398-99)

Mr. Nixon seeks to create the impression that the institutional files of the various components of the Executive Office of the President contain duplicates of the bulk of the material involved in this suit. Thus he says: "Even within the Executive Office of the President...the files are retained from one administration to the next." (Appellant's brief at 27) This statement is totally misleading. Jeanne Davis, Staff Secretary of the National Security Council, testified that there are both institutional files and Presidential files. The institutional files contain formal materials -- NSC precedential documents, documents dealing with NSC institutional continuity, and documents dealing with the decision-making processes of NSC. (J.S. App. 8a, n.1) Mr. Nixon's Presidential NSC files contained the most sensitive and

important substantive documents (App. 701) such as Presidential conversations (App. 699) or correspondence with Heads-of-state (App. 680). Over 350 boxes of Presidential material from the NSC are involved in this action. (App. 706) Because of the White House need for access to some of this material which was not found in the institutional files of the NSC, 25 boxes of Nixon presidential material were copied, and used by the Ford administration. (App. 705)

Also involved are the 880 tape recordings of conversations in the two White House offices and the President's study at Camp David, as well as on telephones in these places and the Lincoln Sitting Room of the White House. These tapes necessarily involve conversations relating "primarily to the conduct of the presidency." (J.S. App. 71a)

INTRODUCTION AND SUMMARY OF ARGUMENT

There are five parties to this action and the legal arguments on all sides have become complex and voluminous. To relieve this Court from being exposed to repetitious argument in five separate briefs, this brief will focus upon Mr. Nixon's civil liberties arguments, leaving other points to other parties to answer.

We note at the outset our own concern that Congress and this Court should not establish any rule of law in dealing with Mr. Nixon that would have a restrictive effect upon the rights and liberties of American citizens. Thus we agree with Mr. Nixon that his First Amendment rights as a citizen should be given the widest protection. We fully

expect at a later time to press for an expansive definition of his constitutional rights in this area when regulations are finally adopted under this law. We agree that his right to privacy and his Fourth Amendment rights should not be narrowly confined. We agree that the reasoning of the court below on these points was inadequate in a number of respects. For example, we question the wiretap analogy adopted by the lower court as a justification for rejecting Mr. Nixon's Fourth Amendment claims. (J.S. App. 79a-83a) We also cannot accept the court's reasoning on the narrow scope of protection under the Fourth Amendment for administrative searches. (J.S. App. 75a, n.56) We also believe that the constitutional right to privacy is more broadly based than the court below indicated. (J.S. App. 68a, n.51)

Nevertheless, we believe that the lower court reached the correct result in upholding the validity of the Act. We believe that Congress exercised its proper constitutional power in this instance for the following interrelated reasons.

POINT I

The Act does not presently infringe upon any of Mr. Nixon's constitutionally protected interests. He is not the owner of the materials at issue -- they are government records constituting the business of the Executive branch for five years. Some are needed for the ongoing business of government. There has been no unbroken tradition of private ownership of presidential materials, and even if such a pernicious tradition had existed, it should not be given legal recognition. In

any event, a new tradition has emerged, investing these papers with a public interest so that every ex-President has immediately reconveyed them to the United States. Congress has broken whatever tradition used to exist on private ownership by passage of the Federal Records Act and the Freedom of Information Act, broadly preserving all government records and making many of them subject to public access. The Act is another example of that legislative effort.

In addition, the Act does not mandate public access to any particular document. It requires that all of Mr. Nixon's private materials be returned to him.

There is no significant immediate impact on Mr. Nixon's rights. He left the materials in the possession of GSA when he left office and the Administrator may retain possession until all the legal issues are resolved. Mr. Nixon has unrestricted access to the materials now. He may assert any constitutionally based right or privilege to any subpoena -- and has done so. If he has any presidential privilege to assert -- which we dispute -- he can assert it and the Act makes no change in the law on presidential privilege. The final regulations may solve any of his legitimate constitutional problems.

The definitions required to be made by the Act -- between governmental and private papers -- can be resolved by existing statutory and regulatory provisions. In fact, Mr. Nixon was obliged by regulations in force during his entire administration to segregate personal papers. Had he done so, the screening process would have been easier and less likely to create problems that he is now citing against the Act. Professional archivists are experienced in making the proper classifications and regularly screen sensitive materials in order to do this task.

POINT II

Nor are Mr. Nixon's Fourth Amendment rights compromised in any way. He never had any reasonable expectation of privacy in materials reflecting and constituting the ongoing business of government. No government official has a constitutional right to resist official inquiry into his conduct of government affairs, except under the Fifth Amendment which does not apply in this case. The Freedom of Information Act is a clear model for the present Act, showing that government officials do not have a reasonable expectation of privacy in their governmental materials since Congress could always provide for greater access than existed at the time the records were created. In addition, final regulations may in fact provide for restrictions on access in the same way that the FOIA provides for specific exemptions on disclosure.

Mr. Nixon's reasonable expectation of privacy in his private papers will be respected. Congress could legitimately provide for screening by professional archivists, since they have the experience and detachment necessary to fulfill the requirements of the Act. The materials are in the Administrator's lawful possession. Mr. Nixon's inconsistent claims with respect to the materials and his past reluctance to reveal materials relating to alleged Watergate abuses led Congress to conclude that professional review was necessary.

The tapes create special problems since they would be more private and intimate; but they are also the most important materials to fulfill certain objectives of the Act. Congress did not want them destroyed since they could reveal important information about the Watergate affair which so endangered confidence in our democratic system. They are also needed for ongoing judicial proceedings and may have information of general historical interest. (However, proposed regulations will provide for exemptions against disclosure similar to those in the FOIA.) Once again Congress acted reasonably in providing for professional screening of the tapes in view of Mr. Nixon's past experience with them and the need for preserving their integrity. Finally, regulations may respect Mr. Nixon's privacy by avoiding word-by-word review in accordance with various suggestions made by the lower courts.

POINT III

Mr. Nixon's First Amendment rights are not infringed upon by the Act. His personal First Amendment rights as a citizen are recognized by the Act and are given force by the regulations. To the extent that his political activities with the Republican party are protected by the First Amendment, they will also be protected against disclosure. There is also a strong First Amendment interest in the people knowing how the affairs of their government are conducted, especially with respect to the Watergate abuses.

ARGUMENT

POINT I

THE ACT DOES NOT PRESENTLY IMPLICATE ANY OF MR. NIXON'S CONSTITUTIONALLY PROTECTED INTERESTS

The overwhelming question on this appeal is whether Mr. Nixon should be allowed to keep 42 million documents generated during his presidency and 880 tapes reflecting his exercise of power because he failed to segregate his private materials properly and therefore government archivists in reviewing this material might be exposed to a small quantity of private documents or conversations. At this stage of the proceedings, the Act does not mandate public access to any particular document. Although Mr. Nixon refers at times to the danger of public disclosure, the constant refrain throughout his brief is that the screening and review by government archivists will injure him by undermining confidentiality in the Presidential office and by violating his constitutional rights. In short, he is trying to point to alleged problems in the screening process (which has not yet been finalized) as a spring board to justify his custody of all 42 million documents and tapes.

It is important to note the steps of the reasoning behind Mr. Nixon's claim.

First, Mr. Nixon assumes that he was the "owner" of all the materials covered by the Act, including documents which he never saw or knew anything about and which reflected the on-going business of government.

Second, Mr. Nixon assumes throughout his brief that there will be immediate public access to his truly personal and private documents. Thus he says: "the extraordinarily broad sweep of Section 101 brings within its coverage every possible piece of Nixon memorabilia, whether or not there is a legitimate national interest in examining it and subjecting it to public disclosure." (Appellant's brief at 123) Later he notes: "The effect of such examination and disclosure is felt directly by the appellant, as an individual whose expression is, by government fiat, seized and held up for microscopic public scrutiny." (Id. at 168)

Third, he assumes that no set of regulations possibly issued by GSA could solve his constitutional arguments and protect his privacy concerns: "the two reports issued to date by the Administrator, together with his proposed regulations, demonstrate that it is 'virtually a certainty' that the extraordinary protective regulations conceived of by the court below are remote from the Administrator's mind." (Id. at 48)

Fourth, he assumes that it is impossible or very difficult to make the classifications required by the Act: "the question will still remain as to where the line is to be drawn [between private and other materials] -- an intractable issue." (Id. at 149) Because of the problems of definition, Mr. Nixon says, the inquiry by the archivists must be quite detailed and the invasion to his privacy extensive.

None of these assumptions is correct.

A. Mr. Nixon Does Not Own the Materials at Issue.

The problem of ownership was not ruled upon by the court below which did not feel it was crucial to the validity of the Act. As the Reporters Committee brief indicates, the materials at issue have always been the property of the United States government. To summarize the legal principles involved:

(1) The United States government, as the employer of Mr. Nixon, has the right to all the materials created by him within the scope of his employment. Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958); Public Affairs Associates v. Rickover, 268 F.Supp. 444, 448 (D.D.C. 1967); Sawyer v. Crowell Publishing Co., 46 F.Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir. 1944), cert. denied, 323 U.S. 735 (1944).

(2) These rules of law apply to the President as well as any other government official. The President holds office bound by the laws and the Constitution. He derives his power from the people who alone are sovereign. To grant the President the right to walk away with every document generated by the White House during his term of office is to grant him a prerogative inconsistent with the spirit of our government and beyond the right of every other public official.

(3) Personal ownership of presidential materials is contrary to the needs of government. Nothing could be more absurd than having a new President enter office not knowing

what his predecessor had done in certain vital areas and placing him in the role of a supplicant to a private citizen to discover the true state of affairs. See Affidavit of Paul Henry Nitze (App. 306); Affidavit of Morton H. Halperin (App. 311); Affidavit of John S.D. Eisenhower, (App. 188). See also the "Public Documents Act," Hearings Before the Subcommittee on Printing, Committee on House Administration, on H.R. 16902, House of Representatives, 93d Cong., 2d Sess. at 81; Cook, "Private Papers of Public Officials," 3 The American Archivist 299 (July, 1975); Arthur M. Schlesinger, Jr., "Who Owns a President's Papers," 27 Manuscripts 178, 181 (1975) (J.S. App. 56a).

(4) There has been no unbroken tradition of private ownership of presidential papers. (App. 488-495). In any event, a new tradition has emerged since the administrations of Herbert Hoover and Franklin D. Roosevelt. Professor Herman Kahn of Yale, upon whose statement Mr. Nixon so heavily relies (Appellant's brief at 31), said before Congress when it was considering the Act: "It is my feeling that since President Roosevelt's time it has become a part of our unwritten constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately on departing the White House, have made their papers the property of the Federal Government." The Public Documents Act, Hearings at 95-96.

(5) The notion of private ownership of presidential materials is inconsistent with established laws on retention of federal records and their availability to the public under the Freedom of Information Act. In

1950, Congress passed the Federal Records Act broadly defining records of the United States to include all documentary and other material "made or received by an agency of the United States Government...in connection with the transaction of public business and preserved or appropriate for preservation...as evidence of the ....functions, policies, procedures, operations or other activities of the Government..." 44 U.S.C. §3301.[3] These records are regulated as to retention and disposal under specific provisions found in 44 U.S.C. §§2901-3314.

Presidential records, like those of every other official, are covered by the law. Furthermore, the Freedom of Information Act,

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3. Mr. Nixon's claim that passage of the Presidential Libraries Act of 1955 (44 U.S.C. §§2107 and 2108) recognized personal ownership of presidential materials is incorrect. (Appellant's brief at 98-99) The Presidential Libraries Act provided for federal maintenance of Presidential Libraries and provided that the President may contribute not only personal papers but also official papers dealing with other government offices he had held. Since all government officials are treated the same way by the libraries act, Mr. Nixon's argument would lead to the absurd conclusion that every governmental official owns his governmental papers. See Judge Richey's discussion in Nixon v. Sampson, 389 F.Supp. at 143-145.

passed in 1966 and amended in 1974, provides for broad public access to all government records. Many White House records are now subject to the FOIA. See 5 U.S.C. §552(e). To allow a former President to take away 42 million documents at the end of his term means that many millions of documents available to the people on January 19 of a new presidential term are taken out of the reach of the FOIA on January 21, after the inauguration of a new President. Furthermore, Mr. Nixon's claim of ownership would mean that millions of documents of a sitting President would be open to disclosure but the same documents of a former President may be barred from view. Merely to state that proposition is to show its absurdity.

(6) Even if there had been an unbroken tradition of private ownership of presidential materials, that tradition cannot have the force of law. This Court has recently rejected the legal force of the unbroken tradition of political patronage in government employment. In Elrod v. Burns, 49 L.Ed. 2d 547, 563, n.22 (1976), this Court noted:

> Partisan politics bears the imprimatur of tradition, not the Constitution. "It may be correct that the patronage system has been followed for 'almost two hundred years' and therefore was in existence when the Constitution was adopted... In any event, if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure...." Illinois State Employees Union v. Lewis, 473

F.2d 561, 568 (CA7 1972).

B. Mr. Nixon's Private Materials Are Not Within the Coverage of the Act and Will Be Returned to Him.

As noted above, the Act applies to certain documents and tape recordings that constitute the "Presidential historical materials of Richard M. Nixon," covering the period of his Presidency from January 20, 1969, through August 9, 1974. Sections 101(a) and (b).

Section 104 of the Act directs the Administrator of General Services to submit regulations regarding access to the materials. The regulations are to provide for public access to records relating to the alleged Watergate offenses and other documents having general historical significance, but the rules must take into account "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege" and "the need to give Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need [to provide the full truth about Watergate] and are not otherwise of general historical significance." Sections 104(a)(5), (7).

Mr. Nixon asserts that the materials under the custody of the Court also include personal notes from his daughters, communications with his wife, and his diaries.[4] However, these materials are not covered by the

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4. Appellant's brief at 145-49.

Act and have no relevance to the questions of whether the Act is constitutional.

The Act applies only to "Presidential historical materials." Mr. Nixon argues that since Section 101(b)(2) refers to the definition of "historical materials" in the Presidential Libraries Act, 44 U.S.C. §2101, Congress has retained governmental custody over every paper and effect he produced or received during his term in office. (Appellant's brief at 33) This argument is simply an attempt to stretch the coverage of the Act far enough to give Mr. Nixon a target for his otherwise meritless claims. Mr. Nixon does not correctly characterize the intent of Congress since he ignores the most significant word in Section 101(b)(1): "Presidential." Although the term "historical materials" is broadly defined in the Presidential Libraries Act, that statute authorizes governmental acceptance of materials from a former President for placement in a library. The present legislation, however, authorizes retention of materials (without regard to the wishes of the former President) and therefore appends "Presidential" to that formulation, so as to retain only those documents related to appellant's presidential role, rather than his roles as father, husband, client, patient or private citizen.

Mr. Nixon's argument is further refuted by Section 104(a)(7) of the Act, which directs the Administrator of General Services to return to Mr. Nixon (for his sole custody and use) records which are not likely to be related to the need to provide the full truth about the alleged Watergate abuses and are not otherwise of general historical significance. The clear purpose of this provision

is to protect Mr. Nixon's interest in personal and nongovernmental materials. The legislative history of the Act makes it plain that Congress was concerned about the preservation and availability of documents relating to governmental affairs and to insure that they were not destroyed pursuant to the Nixon-Sampson agreement. There is no indication whatsoever in the history that the statute was intended to apply to family matters, doctor-patient consultations and the like. It would be surprising indeed for Congress to enact a statute applicable to the personal notes that Mr. Nixon's daughters left for him in his office or residence, and there is no reason for this Court to accept Mr. Nixon's tortured reading of the Act.

C. Mr. Nixon's Complaints About the Act May Be Solved By the Regulations.

Mr. Nixon disputes the finding of the court below that subsequent regulations may solve all of his constitutional complaints and therefore the only immediate impact of the law is to provide for archival review and processing of the materials. Mr. Nixon argues that the law has the following immediate effects:

> [1] all the materials are immediately sequestered, [2] Mr. Nixon's access to them is burdened both by their physical removal and by individualized pre-access paperwork requirements, [3] executive officials in future administrations are granted ready access to them, [4] the burden of claiming and proving presidential privilege is shifted to the former President,

> [5] access to private parties by subpoena is facilitated, and [6] the Administrator is not obliged by any statutory command to take account of the policy of confidentiality in determining how to treat the materials while he is reviewing them or in drafting and issuing his "public access" regulations. (Appellant's brief at 44)

None of these arguments carries any substantial weight. At the very least, Congress could require that the Administrator, who was lawfully in possession of the materials before the Act was passed, retain such possession in Washington until the validity of the Act was determined. The court below rested its decision in part upon the validity of the Congressional finding that Mr. Nixon was an unreliable custodian of the materials. (J.S. App. 47a-50a, 96a) That determination surely is sufficient to justify, at the least, temporary retention by the Administrator.

Pursuant to 41 C.F.R. §105-63.301, Mr. Nixon "shall at all times have access" to the materials. Another regulation, 41 C.F.R. §105-63.206(l), requires all persons seeking access to document his reasons for doing so. This latter provision is designed to protect Mr. Nixon by requiring others to show their justification for access, not to put roadblocks in the way of Mr. Nixon's unrestricted right to look at the materials. Once again, Mr. Nixon seeks to create problems where none exist.

The third argument is among the best reasons for upholding the Act, not for invalidating it. There is simply no reason why a

successor administration should not have access to government records it needs to accomplish its task. President Ford in his donation of presidential papers to the United States explicitly permitted unrestricted access to them by the new administration -- a recognition of the governmental needs involved. See 12 Weekly Compilation of Presidential Documents 1713 (December 20, 1976). The problem of access to political records is discussed below at Point III; and private records are to be returned to Mr. Nixon.

Mr. Nixon argues that the materials may be more available to judicial subpoenas as a result of the fact that he is not their custodian. However, the statute makes clear that Mr. Nixon may cite against any subpoena any right, defense or privilege available to him under the Constitution or federal law. Section 102 (b). Mr. Nixon claims that he will be treated as an intervenor and may have to overcome "procedural hurdles" to assert his rights. (Appellant's brief at 38) Once again he raises a hypothetical horror which has no basis in reality. Mr. Nixon's lawyers have vigorously asserted his rights in every reported case where a subpoena was served for access to his materials. See, e.g., Halperin v. Kissinger, C.A. No. 1187-73 (D.D.C. December 16, 1976) 401 F.Supp. 272 (D.D.C. 1975); Dellums v. Powell, Docket No. 76-1336 (D.C. Cir. January 28, 1977); Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975). In no case cited by him did he suffer any procedural handicaps. He may have lost on the merits, but this was not because the Administrator had custody of the materials rather than himself.

Furthermore, there is nothing in the opinions of those courts upholding a subpoena that indicates that as a result of the Act, the legal rules on presidential privilege have changed in any way. The lower courts simply found, just as the court below did, that whatever privilege Mr. Nixon could claim, it was of less force than a sitting President could assert and those seeking the subpoena had proved their need to access. Mr. Nixon is engaging in totally circular reasoning here. He claims the Act is invalid because other courts had held against his claim of presidential privilege. He argues that since his claim of privilege was obviously valid, the courts must have been influenced by the Act to hold as they did and therefore the Act must be held unconstitutional for undermining his privilege. On the contrary, the proper approach must be that the courts were correct in not upholding his claim of privilege. Thus, Mr. Nixon has even less legal basis for seeking to invalidate the Act.

Mr. Nixon's final argument on the immediate impact of the Act is that there are no procedures mandated for protecting presidential privilege in reviewing the materials. Once again, the simple answer is that an ex-President has no privilege to assert. But even if he did, the Act allows him to assert "any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials. Section 104 (a)(5). If he thinks the regulations will somehow inhibit his ability to assert those rights, his complaint is premature since no regulations have been adopted and approved by Congress. Once the regulations have come into force (and before any examination of the

materials will be made) Mr. Nixon has the right to go into court to challenge them. If his argument reduces itself to the fact that ultimately some screening of the materials will take place by archivists -- a point accepted by the court below -- the extent of the invasion of presidential privilege is minor, given the limited nature of that privilege -- if it exists at all -- when asserted by a former holder of the office.

Finally, Mr. Nixon asserts that this Court should consider the Act in terms of the three sets of regulations drafted by GSA. He claims that it is "virtually a certainty" that protective regulations will not be issued and therefore this Court should accept the fact that broad public access to the most sensitive materials will occur. (Appellant's brief at 48) In support of this position, Mr. Nixon cites the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) and Buckley v. Valeo, 424 U.S. 1 (1976). Once again, his reliance is misplaced.

The two cases cited merely stand for the proposition that once a legislative command is clear, it is not necessary for the final administrative event to occur before a challenge to that command can be made. If the final regulations or administrative act are mandated by the underlying law and cannot be other than what the law commands, the court can consider the validity of the law before that final administrative step is taken.

In the Regional Rail Reorganization Act Cases, a Special Court set up under the Rail Act was obliged to order conveyance of the rail properties covered by the Act to Conrail. Although the Special Court had not yet acted,

the conveyance in question was sure to occur. This Court said: "When the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justifiable controversy that there will be a time delay before the disputed provisions will come into effect." 419 U.S. at 143.

Similarly, in Buckley v. Valeo, the method of choosing the members of the Federal Election Commission was one of the issues presented to this Court. Although it had not yet exercised all of its functions under the Federal Election Campaign Act, the Commission had issued rules and regulations under its statutory authority. This Court held that the legal challenge to the structure of the Commission was ripe for review and the exercise of its other powers was "certain." Therefore, the validity of the selection process of the Commission could be determined. 424 U.S. at 116.

In this case there is no such inevitability or certainty. We still do not have final regulations. This is not a situation where the regulations are themselves dictated by the Act and their final form is certain. There is considerable discretion in the Administrator and the court below suggested broad approaches that the final regulations should take. The only certainty here is that professional archivists will review the material in order to make the classifications finally mandated by the Act and regulations. Thus, the only inevitable invasion of Mr. Nixon's interests is through the screening process discussed at length in the decision below. And no right of Mr. Nixon is sufficiently threatened by that process to warrant any relief in

this case.

D. The Distinction Between Private Materials and Government Materials Can Readily Be Made.

Mr. Nixon argues that the dividing line between what is personal and what is governmental is an "intractable issue." (Appellant's brief at 149). Thus, extensive review of his private materials by GSA officials will be necessary and the invasion of his privacy will be overwhelming as hundreds of archivists pore over his records to determine into which category the documents belong. He presents a series of hypothetical problems as to whether personal conversations with his wife and family or his dictabelt diaries could be considered governmental records.

But the problem of dividing personal and governmental records has existed for every other official of government. As individuals leave government employ, they are reminded of specific regulations that require them to leave all official records behind them. In addition, archivists in Presidential libraries must review millions of documents to determine into which category specific documents fit, or whether they should be made available to the public because they might embarrass a living individual. See Affidavit of Daniel J. Reed (App. 265-67). Thus the problem of definition and archival review is frequently met and solved.

Title 44, Section 3301 contains the basic definition of government records. (See p. supra.) That definition is supplemented by regulations published at 41 C.F.R. §101-11.

202-2.[5] These regulations require each government official to clearly designate his

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5. §101-11.202-2 Documentation standards.
To insure that adequate and proper records are made and preserved in the Federal Government, the following documentation standards will apply in each Federal agency:
(a) The record of the transaction of public business by any Federal official or employee is to be complete to the extent required (1) to facilitate informal action by the incumbemts and their successors in office; (2) to make possible a proper scrutiny by the Congress, other duly authorized agencies of the Government, and other persons properly and directly concerned, of the manner in which public business has been discharged; and (3) to protect the financial, legal, and other rights of the Government and of persons affected by the Government's actions.
(b) With particular regard to the formulation and execution of basic Government policy, Federal officials are responsible for invorporating in the records of their agencies all essential information on their major actions. Significant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record. Minutes should be taken at important board, committee, and staff meetings, and these, together with a copy of the agenda and all documents considered at or resulting from such meetings, should be made a part of the record.
(c) The programs, policies, and proce-

personal records as non-official and to file them separately. These regulations requiring segregation of governmental records from private records went into effect on December 8, 1964 (29 F.R. 16807) and were in force during Mr. Nixon's entire term of office.

To remind government officials of the requirements of law, James B. Rhoads, Archivist of the United States, published a notice in the Federal Register on November 19, 1976, pointing out the various definitions and reminding agency heads of their obligations to monitor compliance. 41 Fed. Reg. 51149 (November 19, 1976).

Furthermore, on November 30, 1976, Counsel to the President Philip W. Buchen sent a memorandum to the White House Staff telling

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dures of Federal agencies are to be adequately documented in appropriate directives. A record copy of each such directive (including those superseded) will be maintained as a part of the official files.
(d) Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files (see §101-11.406-6).

them of their obligations to return all official records before they left:

> Purely personal files and materials, including original documents, may be taken by the departing staff member. Such files include correspondence unrelated to any official or campaign duties performed by the staff member: daily appointment records and telephone logs....copies of records of a personal nature relating to a person's employment or service; and personal copies of photographs, proclamations, commissions or similar commemorative items. Personal files do not include any copies, drafts or working papers that relate to official business or the campaign. Memorandum for the White House Staff, by Philip W. Buchen, dated November 30, 1976, p.2.

These regulations and memoranda indicate that there is a solution for the "intractable issue" presented by Mr. Nixon for every other official in government. As noted above, the Act requires retention of only Mr. Nixon's governmental records, exactly the same problem to which the directives noted above are addressed. If the problem of definition is routinely solved for every other official, it can be solved for Mr. Nixon as well. Granted an ex-President has accumulated far more materials. He may also have different problems concerning his role as head of a political party. (See discussion below in Point III). But the rhetorical questions asked by Mr. Nixon are easily answered in accordance with the definitions noted above. If there are some documents which do not clearly fall in

one category or another, that argues for more professional input rather than less, as the discussion below indicates.

An illustration of the weakness of Mr. Nixon's argument can be shown by the recent controversy over former Secretary of State Henry A. Kissinger's stenographic records of his telephone conversations. When Mr. Kissinger donated his government records to the Library of Congress he omitted his recorded telephone conversations, claiming that these records were private and he could keep them as his own. He did so on the basis of a legal memorandum prepared by the Legal Adviser, Department of State. (See Appellant's brief at 131). However, Dr. Rhoads took issue with Mr. Kissinger. In a letter to Mr. Kissinger dated January 4, 1977, Dr. Rhoads wrote that he was responsible for ascertaining that all federal agencies maintain and dispose of their records in an efficient and lawful manner, and that they preserve records of historical value. He requested that a team of trained archivists examine the transcripts. "I believe these statutory authorities and responsibilities require that I conduct an inspection of the documentary materials mentioned above to verify the conclusions made and actions taken concerning them." Letter, James B. Rhoads to Henry A. Kissinger, January 4, 1977, p.1. A memorandum from the Congressional Research Service of the Library of Congress, dated January 19, 1977, concluded that the stenographic records were governmental rather than private: "If [State Department] regulations permit monitoring [of phone calls] only when deemed 'absolutely necessary for the conduct of business,' then the conversations must have been part of the official duties of the Secretary of State." Memorandum

of Congressional Research Service, Library of Congress, American Law Division, dated January 19, 1977, p.5.

Thereafter, the General Counsel of GSA prepared a memorandum for Dr. Rhoads, confirming that he had the authority to require inspection of the Kissinger transcripts by trained archivists. "The Archivist of the United States has the authority and the responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts...." Memorandum, Donald P. Young to James B. Rhoads, dated February 3, 1977, re Archival Inspection of Kissinger Telephone Transcripts, p.2. The General Counsel outlined the various definitions to be applied in this situation and concluded: "...it is the very existence of a 'gray area' that argues so strongly for the input of professional archivists in the decision-making process." Ibid. at 5. He also discussed the issue of privacy: "While conceding the possibility of some invasion of the privacy of Dr. Kissinger or certain of the persons with whom he was speaking, we believe this threat is far outweighed by the public interest served by archival inspection." Ibid. at 11.

In the middle of the controversy, Dr. Kissinger donated the materials in question to the Library of Congress, but he imposed strict restrictions on access to those materials. A Freedom of Information Act suit has now been filed to secure access to these materials and to determine whether they are private or public. Reporters Committee for Freedom of the Press v. Vance, C.A. No. 77-0220 (D.D.C. 1977).

The controversy is important for the purposes of this suit for the following reasons:

(1) Dr. Rhoads' request for access to the materials to determine whether they were public or private is precisely what the Act involved here specifies. Trained archivists must look at the materials at issue if they are to make the judgments required under the law.

(2) The definitional problems can be solved by reference to the key statutory and regulatory provisions noted above. The same provisions apply to the Nixon materials and the Kissinger materials.

(3) Mr. Nixon argues that his claim of privacy requires that no access be allowed by trained archivists even to determine whether the privacy claim is valid or not. In other words, he is arguing that merely to assert that certain records are private is to prevail on that claim, since even the minimal inquiry by an archivist would violate his privacy. But the Kissinger case shows that some inquiry is necessary -- if not by Dr. Rhoads or his subordinates, then by the district court in the FOIA claim. The law could not be otherwise.

POINT II

MR. NIXON'S FOURTH AMENDMENT RIGHTS ARE NOT VIOLATED BY THE ACT

A. Mr. Nixon Had no Reasonable Expectation of Privacy with Respect to His Presidential Papers.

The court below and all the parties seem to agree that the touchstone of Fourth Amendment protection is a person's reasonable expectation of privacy.

The court below found that since Mr. Nixon saw no more than 200,000 documents, his reasonable expectation of privacy in all but a small amount of the materials was nonexistent. As the court said: "If plaintiff himself saw no more than 200,000 documents, we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private." (J.S. App. 69a)[6] This is because a person

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6. At a later point in the opinion, the lower court suggested that Mr. Nixon had a reasonable expectation of privacy in his personal records: "...if other private materials were not excluded from review in the past, that might demonstrate little more than that past Presidents chose not to protect fully their privacy rights, a choice not necessarily binding upon Mr. Nixon....we believe that the manner in which such materials [i.e., private materials] have been treated by past Presidents ...gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his consent." (J.S. App. 73a-75a) The court further noted: "...we believe that plaintiff's reasonable expectation of privacy is adequately established by the practice of de facto control of presidential materials by former Presidents." (J.S. App. 74a, n.55.) In the context of the court's discussion it clearly meant that Mr. Nixon had a reasonable expectation of privacy in his personal and private materials.

can hardly have a reasonable expectation of privacy in materials he never saw. Furthermore, insofar as the materials reflect the activities of executive department officials reporting to each other, any expectation of privacy disappears in the exposure to executive branch members in the chain of command. (J.S. App. 69a)

As for the tape recordings and the 200,000 documents which Mr. Nixon reviewed or wrote, he had no reasonable expectation of privacy in materials that constituted the exercise of Presidential power. Even if they are not owned by the United States, everyone (except Mr. Nixon) seems to agree that they are affected with a public interest or infused with a public trust (J.S. App. 70a) that created an expectation that they would be donated back to the United States, just as former President Ford has recently done. That tradition, discussed by Professor Herman Kahn above, undercuts the basis for a Fourth Amendment claim by Mr. Nixon.

More important, there is no reasonable expectation of privacy by any public official with respect to the exercise of his governmental powers. This Court said in Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 284 (1968), that the state could demand "an accounting of their [the state employees] use or abuse of their public trust" and they could be questioned "relating to the performance of their official duties on pain of dismissal from public employment." 392 U.S. at 284. In Lefkowitz

v. Turley, 414 U.S. 70, 80 (1973), this Court noted that a public employee "could be discharged for refusing to answer questions about the performance of his official duties."

These cases must mean that no government official has a reasonable expectation of privacy with respect to materials reflecting the exercise of his official duties. If he can be fired for refusing to give an account of his office, he cannot have Fourth Amendment protection to resist an inquiry into the use of his powers. The Fifth Amendment does not apply to this case since Mr. Nixon has been pardoned and cannot be prosecuted for anything found in the materials. Since one of the prime purposes of the legislation is to discover the full truth about Watergate, Congress could legitimately require that the 200,000 documents and the tapes be reviewed to discover what they show about Mr. Nixon's responsibility for the abuses of power identified under the generic term of "Watergate."

As to those documents and tapes not involving Watergate but related to other exercises of presidential power, Mr. Nixon still does not have any reasonable expectation of privacy. The cases cited above clearly provide that any inquiry into the performance of public duties is not barred by the Fourth Amendment on the grounds that a public official can consider his official actions as private. In addition, Congress amended the Freedom of Information Act in 1974 to make clear that documents of the Executive Office of the President were subject to disclosure under the FOIA. P.L. 93-502, 88 Stat. 1561 (November 21, 1974). In 1971, the District of Columbia Circuit had held that the Office of Science and Tehcnology, part of the Executive Office of the President, was an agency of the government subject to the FOIA. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). Congress considered that conclusion the correct interpretation of the law and formalized it in the 1974 amendments, adding 5 U.S.C. §552(e) which defines agency as including the Executive Office of the President. The Conference Report to the 1974 amendments states:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in Soucie v. David ...The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. Freedom of Information Act and Amendments of 1974, Source Book, House Committee on Government Operations, 94th Cong., 1st Sess. (1975) at 232.

The legislative development of the FOIA is relevant in the instant action for the following reasons:

(1) There was never any reasonable expectation of privacy with respect to agency records within the Executive Office of the White House since they had been subject to the FOIA from the beginning. (2) Congress could legislate retroactively to make available executive department records which, at the time they were created, were not considered subject to disclosre. Thus, although the FOIA was passed in 1966, documents from before that date are routinely made available under the act. The government official

creating the document or about whom it is written, will not be heard to say that at the time he created it, he did not believe it was subject to disclosure and therefore he had a reasonable expectation of privacy with respect to its contents. Similarly, the courts regularly apply the 1974 amendments to documents created before that date without considering any problems of retroactivity or a "reasonable expectation of privacy" by the government official whose activities may be revealed in the documents requested. See, e.g., Kruh v. General Services Administration, 421 F. Supp. 965 (E.D.N.Y. 1976); Weissman v. Central Intelligence Agency, Docket No. 76-1566 (D.C. Cir. January 7, 1977).

(3) In the same way that Congress amended the FOIA on November 21, 1974, to make a broader range of documents available to the public, it could lay the basis for futher disclosure in December, 1974, by passing the Act in question here. Whatever else might be said about the Act, it cannot be seriously argued that Mr. Nixon can attack its validity because he did not think Congress would provide for more public access to governmental records than was in force at the time he left office. If he can assert any presidential privilege in accordance with United States v. Nixon, 418 U.S. 683 (1974) -- a point we vigorously dispute -- that right can be asserted at any time. But he cannot argue that although he does not have any presidential privilege, he thought he did and therefore he has a Fourth Amendment right to resist disclosure because of his reasonable expectation of privacy.

In short, there is not a word in any of the legislative history of the FOIA or in the

cases interpreting it that the government officials whose records were made available under the Act had any Fourth Amendment rights to resist disclosure because they reasonably expected Congress to keep their records secret.

In addition, the Act as such does not mandate disclosure of any particular document. In the same way that Congress could broadly make all Executive Office documents subject to the FOIA and then exempt many of them from disclosure under exemption 5 [5 U.S.C. §552 (b)(5)], Congress could require retention of all presidential materials to prevent their destruction but protect any constitutionally based privilege through specific exemptions from public disclosure. It may well be, as the parties upholding the Act have argued from the beginning, that the regulations will preserve whatever privilege, if any, an ex-President may assert. Thus, if he has any expectation of privacy in certain immediate staff documents (which we do not believe would be reasonable in any event) that expectation may finally be fulfilled when the regulations are issued.

B. Mr. Nixon's Reasonable Expectation of Privacy in His Personal and Private Papers Will be Respected.

The only Fourth Amendment issue that concerned the court below related to Mr. Nixon's reasonable expectation of privacy in his private papers and his tapes. We agree that Mr. Nixon is protected by the Fourth Amendment with respect to his diaries or his personal conversations or communications with his wife and family, his lawyer, minister or other intimates and friends. And the Act

recognizes those rights and requires return of these materials to him. Thus, the only issue is whether the screening and review process mandated by the Act to determine whether records are private will amount to such an unreasonable invasion of Mr. Nixon's privacy that the Act must be invalidated.

Mr. Nixon's argument reduces itself to a claim that because someone else must do the review and screening of the few private documents and conversations caught in the materials, then he must walk away with all 42 million of them. Congress could reasonably have decided that independent archivists should do the screening. They have an unblemished record of discretion in handling extremely sensitive materials. As Daniel J. Reed, an Assistant Archivist in the Office of Presidential Libraries, noted in his affidavit:

> In the course of arranging and describing presidential historical materials at these [presidential] libraries, the archivists routinely review materials of the President, his staff and his family and make determinations concerning access to them. Such documents in many instances include those of a personal or private nature, such as medical letters or personal diaries. Library archivists likewise review security classified documents on a regular basis. The archivists, because of their professional experience and training, are skilled in reviewing and segregating such materials. App. 266.

Every President since Herbert Hoover has relied upon such archivists to review their material. In fact, Mr. Nixon himself donated

a substantial portion of his pre-presidential materials to the United States as well as his Vice-presidential materials. (App. 269, 273) Each chattel deed provided that archivists should in the course of their duties "have such access to the said Materials as shall be necessary for normal archival processing activities." (App. 270, 274)

The professional archivists alone have the expertise and manpower to handle the task for sorting out so many materials. Congress could have legitimately decided that regularized procedures were necessary in view of the past history of the compromising of the materials. If there may be difficult problems of definition, that "argues so strongly for the input of professional archivists in the decision-making process," as the General Counsel of GSA has explained above.

Congress could also have reasonably concluded that the screening and review process should be done by professional archivists instead of Mr. Nixon, because it felt Mr. Nixon was not a reliable reviewer of the materials. (J.S. App. 47a-49a, 96a) Mr. Nixon is neither expert in reviewing the materials nor disinterested. Congress could legitimately have concluded that there might have been a temptation by Mr. Nixon to distort or destroy the historical record since serious charges of misconduct have been leveled against him.

In addition, Mr. Nixon has played fast and loose with the definition of what is private and what is official. Mr. Nixon has testified that he regards a memorandum from John Dean to Bud Krogh in the White House suggesting action to terminate or restrict government contracts awarded to the Brookings

Institution as a private "political" document rather than a governmental one. (Nixon Dep., App. 577; Exhibit D, App. 649) He took the position that his decision of June 23, 1972, to use the CIA to frustrate the FBI's investigation of Watergate was "political," and "to an extent personal." (Id. at 523)[7] Mr. Nixon's demonstrated reluctance to reveal materials relating to the alleged Watergate abuses and other embarrassing documents gives

---

7. Three years ago, Mr. Nixon took a contrary position before this Court in United States v. Nixon. His attorney said, in response to a question from one of the Justices:

> "QUESTION: Would you automatically say that every conversation about Watergate is in the course of the performance of the duties of the President of the United States?
>
> "MR. ST. CLAIR: I would think it would be, yes, sir.
>
> "QUESTION: Why is that, Mr. St. Clair?
>
> "MR. ST. CLAIR: Because he has the duty, (a) to enforce the laws; that is, to prosecute these cases; and (b) he has to take care to see that the laws are enforced; that is, to investigate."

United States v. Nixon, 418 U.S. 683 (1974), Transcript of Argument at 84-86.

Of course, in that case it was in his interest to have the broadest definition of what is an official record, since he was urging broad protection for presidential communications on a claim of presidential privilege.

little assurance that he or his designees would objectively restrict themselves to removal of truly personal records from the presidential files. In such circumstances, the best course is clearly the one Congress has chosen -- the segregation of Mr. Nixon's personal materials from those belonging to the Government by neutral and professional archivists.

The kind of review required by the Act is similar to that approved by this Court in United States v. Nixon:

> "[W]e find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection...." 418 U.S. at 706.

If this Court were willing to approve in camera review of intimate presidential conversations of a sitting President, the careful professional screening of an ex-President's materials in the manner prescribed by the Act is surely valid.

Finally, the court below recommended a series of methods for minimizing the intrusion into Mr. Nixon's privacy, to avoid a "word-by-word" review of the private materials. (J.S. App. 29a, n.13) Part of the reason why extensive screening may be necessary is because Mr. Nixon himself commingled the private and public materials -- contrary to specific regulations referred to above, in force throughout his entire administration, which mandated separate filing of personal records. Having been responsible for the

problem that created the need for extensive archival review, Mr. Nixon could hardly be allowed to benefit thereby, since the personal materials cannot constitute more than a tiny fraction of the 42 million documents. In short, Mr. Nixon's argument comes down to a claim that because some of the 200,000 documents and the taped conversations are not clearly public or clearly private, the archivists must examine the doubtful materials in detail to determine their proper character. On that basis, Mr. Nixon claims entitlement to all 42 million documents.

This analysis leads to the conclusion that there is no "general search" involved by operation of the Act. Mr. Nixon's reliance upon Stanford v. Texas, 379 U.S. 476 (1965), is misplaced. In that case the police seized 2,000 of the petitioner's books, pamphlets and papers, looking for allegedly pro-Communist materials. This Court held that the broad search warrant in that case permitting seizure of such large amounts of a private citizen's own papers violated the Fourth Amendment. The warrant in that case was a "general warrant" -- precisely the kind of overbroad authorization which the search and seizure clause was designed to prevent.

In this case, the Act does not seize personal papers. What is preserved by the Act are governmental records, the great bulk of which Mr. Nixon never saw, constituting the business of the Executive branch of government. Congress has the right to preserve all government records from destruction by invalidating the Nixon-Sampson agreement and making them available for the on-going business of government. Finally, the personal papers involved were not "seized" in the man-

ner involved in Stanford. They were intermingled with government records in the Nixon White House and all were left in the possession of GSA. The Administrator who is in lawful possession of the materials must now sort out the personal records and then return them to Mr. Nixon. Once again, the claims of a "general warrant" or a "general search" come down to a complaint that professional archivists and not Mr. Nixon must do the review and screening. For the reasons noted above that choice was a reasonable one.

C. The Preservation of the Tapes and Their Treatment by the Act are a Reasonable Exercise of Congressional Power.

The tape recordings of presidential conversations present special problems. Mr. Nixon's own discussions are involved, his family, his lawyers or his physicians might have talked to him in the Oval Office and had their conversations recorded, the discussions with his aides would at times be quite confidential, and certainly political conversations occurred as well. In addition, the screening and review process to separate personal from governmental is much more complex.

By the same token, the tape recordings may be the most important materials to fulfill some objectives of the Act. It is certainly the uniform opinion in this nation that it was the revelations on the tape recordings handed over in response to the subpoena upheld by this Court in United States v. Nixon, that led to the resignation of Mr. Nixon and showed the extent of his involvement in the abuses of power now known as the Watergate affair. The Watergate crisis is

one of the most severe that this nation has ever endured. Although the "nightmare" may be over, as President Ford said on taking office, the lessons that we can draw from it are still unknown. The nation still does not know how far White House officials were involved in an effort to break the law, to subvert our democratic institutions and to use governmental power secretly to keep themselves in office. If the hit-or-miss method of the Special Prosecutor was able to unearth so much material relating to the misuse of power, it is certainly reasonable for Congress to conclude that still more review is necessary to discover the full truth about the abuses of power connected with the Watergate affair.

Thus, the first purpose of the law, as noted in the preamble, is to "protect and preserve recordings of conversations involving former President Richard M. Nixon." Since the Nixon-Sampson agreement would permit Mr. Nixon to destroy the tapes within five years -- and they would be destroyed automatically on his death and in any event after ten years -- Congress could conclude that they must be preserved in the first instance. In view of the great crisis in confidence concerning the integrity of the governmental process as a result of Watergate, Congress could also have laid the basis for public access to materials relating to Watergate.

Congress could also conclude that the documentary materials and the tapes should be preserved for use in judicial proceedings. Mr. Nixon has recently been found personally liable for damages for improperly initiating a wiretap program on government employees. Halperin v. Kissinger, C.A. No. 1187-73

(D.D.C. December 16, 1976). Some of the Nixon presidential materials were submitted in evidence in that case and some of the tape recordings previously made public were relevant in that action. Halperin v. Kissinger, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment Against the Individual Defendants, filed July 9, 1976, at 12-13.

The District of Columbia Circuit has recently held that the plaintiffs in another action had made a sufficient showing of need for still other tapes. The court ordered a professional archivist to be appointed as a special master to review a small number of tapes to look for the information at issue. Dellums v. Powell, Docket No. 76-1336 (D.C. Cir. January 28, 1977).

Finally, there may be still other materials of general historical interest on the tapes which should also be preserved. The proposed regulations of the Administrator provide for broad protections against access if disclosure would involve a clearly unwarranted invasion of personal privacy or constitute libel or slander. Other restrictions on disclosure track the various exemptions in the FOIA. Proposed Regulation §105-63.402-2.

If Congress could take the steps noted above -- preserve and protect the tapes, lay the basis for public access to conversations about abuse of power, preserve the tapes for use in judicial proceedings, and protect the other conversations of general historical interest (subject to protections for personal privacy) -- then the only question that remains is who should do the screening to discover materials in these categories and return all others to Mr. Nixon.

It is true that ordinarily a subpoena is self-enforcing and the person to whom it is directed must himself do the screening and production. But once again, Congress could rationally conclude that professional archivists should perform this function rather than Mr. Nixon. The tapes are lawfully in the Administrator's possession. Archivists have the professional skill and experience to make the classifications required by the Act.

Mr. Nixon has already had some unfortunate experiences in dealing with the tapes -- Congress could have considered the famous eighteen and one half minute gap in one tape and the discrepancy between the transcriptions prepared by him and those prepared by the House Judiciary Committee. (See Motion of Federal Appellees to Affirm, at 23, n.14). The decision to let professional archivists review the tapes is not meant to be punishment in any way. If Congress has the right to pass legislation preserving the tapes and laying the basis for some public access to vital areas of them, it could select the most reasonable method for insuring the integrity of the tapes and that they will be classified in the most professional manner.

Finally, a screening process can be established that would minimize any intrusion into Mr. Nixon's privacy. The court below suggested three methods for avoiding word-by-word review of the materials and tapes:

(1) providing for general classifications of materials with only a cursory glance at the contents to identify private communications and separate them immediately;

(2) giving Mr. Nixon a voice in the choice of archivists;

(3) providing Mr. Nixon with administrative review of proposed classifications. (J. A. App. 29a-31a)

Similarly Judge Richey had suggested a careful two-button procedure for reviewing the tapes whereby conversations would not be initially reproduced if Mr. Nixon's representative considered them privileged or beyond the scope of the Act. (See 389 F.Supp. at 158.) Other possibilities come to mind: assuming that conversations solely among family members are presumptively private as well as conversations with his lawyers and physicians, so that word-by-word review would not take place in this area.

The point is that a variety of methods can be used to take account of Mr. Nixon's legitimate expectations of privacy with respect to his purely private conversations.

But Mr. Nixon goes further. He argues that no system devised by the mind of man can adequately protect his privacy. Before any review procedure has been finalized, he is saying that it is impossible to protect his privacy by any method and therefore the Act is unconstitutional. This Court should reject that argument and allow the Administrator and the courts considering the final regulations to attempt to deal with that issue.

POINT III

MR. NIXON'S FIRST AMENDMENT RIGHTS ARE NOT VIOLATED BY THE ACT.

Mr. Nixon further contends that the Act

violates his First Amendment rights of free speech and association. (Appellant's brief at 164-74) Mr. Nixon's claim reduces itself to four separate arguments: (1) the review and screening of Mr. Nixon's political actions as head of the Republican Party would violate his First Amendment rights; (2) possible public disclosure of his actions would inhibit his future ability to exercise his First Amendment rights; (3) the wide discretion afforded the Administrator in drawing regulations and implementing them violates his rights; (4) his personal First Amendment rights will be infringed by government review of his materials.

Taking these points in reverse order, the intervenor-appellees conceded from the start that Mr. Nixon's First Amendment rights as a citizen must be fairly protected. If Mr. Nixon belonged to the John Birch Society -- or the A.C.L.U. -- that information should not be made public, as we asserted to the court below. (J.S. App. 91a, n.65) The regulations should clearly protect that right. Since the Act recognizes the personal rights of Mr. Nixon in that regard (Section 104(a)(5), there is no basis for voiding the Act on that basis.

Mr. Nixon's argument on the wide discretion given the Administrator on access and disclosure misses the point. He cites a series of cases from Lovell v. Griffin, 303 U.S. 444 (1938), through Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), which established the principle that unbridled discretion in a public official that allows him to determine whether the exercise of First Amendment rights will be permitted or not cannot be allowed. But that is not the case here at all.

Mr. Nixon has exercised his First Amendment rights already. The only discretion is whether any of these activities will be made public or will be reviewed by archivists in a certain manner. That kind of discretion can in no way affect Mr. Nixon's rights in the future, and therefore the Lovell line of cases are irrelevant.

Mr. Nixon's third argument (which was urged below) is only briefly alluded to here. (Appellant's brief at 168-69) Mr. Nixon argued below that disclosure of his previous actions or statements will make it embarrassing for him to take an inconsistent position at a later time, thus undermining his political effectiveness in the future. (J.S. App. 92a) But the court below correctly noted that this interest was too speculative. In any event, discrete review by archivists could not make that danger a real one.

Mr. Nixon's final argument relates to his role as leader of a political party. This Court recognized in Buckley v. Valeo, 424 U.S. 1 (1976), that involvement in partisan politics is closely protected by the First Amendment. With respect to the specific provisions of the Federal Election Campaign Act, this Court held that Congress could legitimately impose ceilings on individual contributions to political campaigns but could not limit independent political expenditures or fix a ceiling on personal expenditures or overall campaign spending by candidates. It also held that broad reporting and disclosing provisions aimed at reducing corruption were not facially unconstitutional, unless they infringed on the kind of associational privacy rights recognized by NAACP v. Alabama, 357 U.S. 449 (1958). In other words,

this Court recognized that the constitutional privilege against disclosure of contributions to partisan political activities was not absolute. There is nothing in those holdings remotely applicable to the situation here.

Furthermore, this Court's decision in Buckley shows that Mr. Nixon's complaints against the Act are premature. The Federal Election Campaign Act contained a provision requiring every political committee to keep records of every person making a political contribution above $10, but the committees were obliged to report only those persons making contributions above $100. The Federal Election Commission was authorized to inspect the lists of persons contributing between $10 and $100, but there was nothing in the act authorizing disclosure by the Commission of the persons in that category. This Court refused to pass on any alleged First Amendment problems concerning possible disclosure of persons making comparatively low-level contributions:

> We agree with the Court of Appeals that there is no warrant for assuming that public disclosure of contributions between $10 and $100 is authorized by the Act. Accordingly we do not reach the question whether information concerning gifts of this size can be made available to the public without trespassing impermissibly on First Amendment rights. 424 U.S. at 84.

Similarly in this case there is no warrant for assuming that public disclosure of any of Mr. Nixon's strictly political activities is authorized by the Act.

Nevertheless we recognize that some of Mr. Nixon's activities with respect to the Republican Party in the period covered by the materials may deserve protection. If documents or tapes discuss Mr. Nixon's position on where the Republican Party should hold its convention, they might be covered by the "constitutionally based right or privilege" which would limit access to the materials under Section 104(a)(5). On the other hand, a recommendation to the President that a certain person be appointed to a federal post because of his contributions to the party involves the exercise of Presidential and not party power.

Mr. Nixon's concern that information on Republican Party activities might be exploited by a successor administration was not shared by President Ford, who donated all his political papers to the United States with no extraordinary restrictions on access to those materials. Those documents relating to his "candidacy for" any public office and "to my other political and public activities" are covered by the donation agreement, 12 Weekly Compilation of Presidential Documents 1711 (December 20, 1976), and these political documents are not considered restricted materials. (Ibid. 1713)

It is also important to recognize that the Act promotes the high public purpose of the First Amendment -- to promote free public discussion of governmental affairs. Public debate must not only be unfettered, it must also be informed. The First Amendment guarantees a free flow of information to the people concerning public officials and protects the right of the people to receive as

well as to express ideas and information.[8] As this Court stated in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...may not constitutionally be abridged...." The goal of the First Amendment is "producing an informed public capable of conducting its own affairs...." Id. at 392; see also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975).

Mr. Nixon weighs in the balance against these vital considerations what is at best a sheerly speculative argument. He suggests that the statute penalizes his past speech by disclosing it, since disclosure will curtail his ability to speak and associate freely. But public disclosure is not required by the Act and access by archivists does not infringe any significant First Amendment right.

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8. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965).

CONCLUSION

For the reasons stated above the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al.*;
JACK ANDERSON;
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
and LILLIAN HELLMAN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE JACK ANDERSON

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE JACK ANDERSON

COUNTERSTATEMENT OF CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions quoted by appellant, Article I, Section 7, clause 2 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, . . .

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the legislative power of the United States, exercised by the Congress and the President concurrently as provided in the Constitution, extends to custody and control of the records accumulated by a former President of the United States while in office.

2. Whether access to such records by successor Presidents, by agencies of the executive branch in the lawful conduct of government business and by the public violates any privilege of a former President.

3. Whether a statute taking custody and control of such records for the purpose of public access and education, ongoing government business and preservation for history, while providing to appellant unique, immediate and complete access to the records, is a "trial," punishment or attainder of the former President who accumulated the records.

4. Whether the former President's right to privacy is violated by archival screening and processing of the records, the overwhelming bulk of which are not private or personal, for the purpose of returning private, personal records to the former President.

INTRODUCTION

Appellant Richard M. Nixon appeals from the judgment below upholding the constitutionality of the Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695, 44 U.S.C. §2107 note and §§3315-24 (Supp. IV, 1974) ("the Act"). The Act provides for government custody, control and processing of the tape recordings and papers ("the records") of appellant's tenure as President of the United States, and in particular, for early public disclosure of those of the

records which relate to criminal and abusive activities of appellant and others during that tenure.

Appellant has filed a brief of 178 pages. In his brief appellant, *inter alia,* ignores recent history, impugns the motives of the Congress and his successor, President Ford, in enacting the Act, asserts a prerogative akin to that of a monarch and characterizes the Act as a punishment and hence a bill of attainder. In this brief intervenor-appellee Jack Anderson, a daily newspaper and radio reporter, principally addresses these aspects of appellant's brief, dealing more briefly with appellant's separation of powers and right of privacy arguments.

CHRONOLOGY OF IMPORTANT EVENTS LEADING TO THIS LITIGATION[1]

DATE	EVENT
June 17, 1972	Five men are arrested at Democratic National Committee Headquarters while attempting to repair electronic equipment.
August 30, 1972	The President announces that Dean has conducted and completed an investigation into the Watergate affair. Claims that no one in the White House or employed by the administration was involved.
January 8, 1973	Watergate break-in trial begins.

[1]Excerpted, with minor editing of a few of the items reproduced, from U.S. Dep't of Justice, Watergate Special Prosecution Force, Report 253-64 (Oct. 1975).

DATE	EVENT
January 15 to January 22, 1973	Press reports suggest that Watergate defendants were being paid by unnamed sources—possibly CRP—and that they were promised money and clemency to plead guilty.
March 19, 1973	McCord writes to Judge Sirica alleging that perjury was committed at trial and that defendants were pressured to remain silent.
April 5, 1973	Judge W. Matt Byrne reports a personal meeting with Ehrlichman, where Ehrlichman suggested a possible future assignment for Byrne.
April 17, 1973	The President announces White House staff will appear before the Senate Select Committee, that there have been major new developments in the Watergate investigation, and that real progress has been made toward finding the truth.
April 23, 1973	White House issues a statement denying that the President had any prior knowledge of the Watergate affair.
April 27, 1973	Judge Byrne reads memo at Ellsberg/Russo trial describing Hunt and Liddy break-in of Dr. Fielding's office.

DATE	EVENT
April 30, 1973	Haldeman, Ehrlichman, Dean and Kleindienst resign.
May 7, 1973	A spokesman for the President denies that there were any offers of clemency to anyone connected with the Watergate affair.
May 9, 1973	Egil Krogh resigns; claims full responsibility for the Fielding break-in.
May 11, 1973	Judge Byrne dismisses all criminal charges against Ellsberg and Russo in Pentagon Papers case.
June 25, 1973	Dean tells Senate Select Committee that the President knew of the cover-up as early as September 1972.
June 25, 1973	Dean submits "enemies list" memorandum of August 16, 1971, to Senate Select Committee.
July 7, 1973	The President informs the Senate Select Committee that he will not personally appear before the Committee and that he will not grant the Committee access to Presidential files.
July 16, 1973	Alexander Butterfield informs the Senate Select Committee of the presidential taping system.
July 24, 1973	Ehrlichman tells the Senate Select Committee that the break-in at

DATE	EVENT
	Fielding's office was legal, and that it was undertaken for national security purposes.
July 31, 1973	The *Washington Post* reports that the President did not sign the deed giving his papers to the National Archives, that the deed was not delivered until April 1 of 1970 (nine months after the effective date of the 1969 law prohibiting tax deductions for such gifts) and that the deed was never accepted by the Archives as a formal written document.
October 31, 1973	J. Fred Buzhardt, Special Counsel to the President, informs the Court that two of the subpoenaed tapes do not exist.
November 21, 1973	Buzhardt informs Judge Sirica of an 18-1/2 minute gap on the tape of a June 20, 1972 conversation between the President and Haldeman.
April 16, 1974	Special Prosecutor issues a trial subpoena for 64 White House taped conversations.
April 30, 1974	President submits to House Judiciary Committee and makes public his versions of transcripts of recorded conversations.
July 24, 1974	Supreme Court unanimously upholds Special Prosecutor's tapes

DATE	EVENT
	subpoena for Watergate trial in *United States v. Nixon.*
July 27, 1974	House Judiciary Committee adopts Article I of impeachment resolution charging the President with obstruction of justice.
July 29, 1974	House Judiciary Committee adopts Article II of impeachment resolution charging the President with misuse of powers, violating his oath of office.
July 30, 1974	House Judiciary Committee adopts Article III of impeachment resolution charging the President with failure to comply with House subpoenas.
August 9, 1974	Richard Nixon resigns from office.
September 8, 1974	President Ford pardons Richard Nixon.
	President Ford announces the agreement between Sampson and Nixon giving Nixon ownership and control over access to Nixon Administration papers.
October 17, 1974	Richard Nixon asks the Court to enforce September 7 Nixon-Sampson agreement.
December 19, 1974	President Ford signs S. 4016 into law—the Presidential Recordings and Materials Preservation Act.

STATEMENT

Appellant's 178-page brief winds slowly and ponderously through a constitutional forest like Grimm's lost children who made obstacles and pitfalls disappear by closing their eyes and denying their existence. Its most remarkable conjuring trick is the illusion that appellant left office just like every other President (Br. 4-5)[2] and its rewriting of history, in the manner of the Great Soviet Encyclopedia, to erase two years of crimes and attempted subversion of the Constitution by scoffing reference to the "Watergate affair."[3]

His brief continually refers to "Congress" as singlehandedly interfering with Presidential prerogative, ignoring the fact that the Presidential Recordings and Materials Preservation Act was enacted by the Congress and signed by the President in their concurrent exercise of the legislative power of the United States, as provided in the Constitution, art. I, § 7.

His brief says that "the amount of such documentary material [which he claims] has been estimated at inflated figures as high as 42,000,000 pages" (Br. 25). He has forgotten that this "inflated" estimate was his own.[4] The size of his claim grows and shrinks like Alice—from "42 million documents" in October 1974, down to

> that small percentage of material most intimately connected with appellant's personal and political

[2] "Br." refers to appellant's brief filed herein in January 1977.

[3] Reference to the "Watergate affair" or "Watergate," always within quotation marks, appears at least 19 times, pp. 10, 11, 17, 36, 41, 117 (twice), 118 n.53 (twice), 125, 127, 129 (twice), 131, 132 (twice), 143, 150 and 161 n.71.

[4] Motion [of plaintiff Richard M. Nixon] for a Preliminary Injunction at 3 (filed Oct. 17, 1974), Nixon v. Sampson, 389 F. Supp. 107 (D.D.C. 1975): "While President, Richard Nixon and his staff generated approximately 42 million documents which are commonly referred to as 'presidential materials.' "

> activities while in office—including tape recordings of his conversations and some 200,000 other items personally prepared or reviewed by appellant . . . [which] has always remained segregated . . . and is presently stored in approximately four small areas in the White House . . . .

when he was seeking this Court's review in May 1976 (J.S. 4),[5] and now back up to the tapes plus 23.3 million pages[6] in January 1977 after this Court granted review.

His brief artfully confuses himself—a private citizen since August 9, 1974, when he fled from office in grave danger of prosecution until he was pardoned a month later—with the President of the United States (President Ford when he filed this action, President Carter now), saying that the Act "take[s] from a particular *Chief Executive* the ultimate control over the materials of his office, thereby interfering with the *President's* management choice.[7]

While disclaiming any challenge to the "motives of the legislators" (Br. 129), he refers to a Congress impelled by "public," or "popular," "passions" (Br. 11, 65, 130) and "frenzied public opinion" (Br. 127).

He attempts to foist on this Court as his own motivations for keeping the tapes and papers out of the possession of the government and away from the public

[5] "J.S." refers to appellant's Jurisdictional Statement filed herein on May 3, 1976; "J.S. App." refers to the Appendix to the Jurisdictional Statement.

[6] Br. 25-26: 42 million less 7.3 million in greeting cards and public opinion mail and 11.4 million of records of the executive departments.

[7] Br. 58 (emphasis added). He refers to himself as "the President" on nearly every page of part I of his Brief, pp. 43-129.

eye, a selfless desire to protect the presidency from encroachment on its executive power,[8] a concern for the sensibilities of his family[9] and a regard for the First Amendment rights of past, present and future presidential advisors and "the future political and professional careers of hundreds of individuals."[10]

Argument, however, is no substitute for the record, which relentlessly declares his real motive and interest—to keep the record of his faithless stewardship of the highest office in the gift of his countrymen from ever seeing the light of day; an interest revealed, perhaps inadvertently, only on page 107 of his brief as "his self-interest and the natural wish that history treat him kindly."

Thus appellant's agreement of September 7, 1974, provided that no one would have access to documents for three years except by appellant's permission, and that after three years he could withdraw any documents for "any purpose or use I may deem appropriate"—which would include their destruction (J.A. 40), provided that no one would have access to the tapes for five years except by appellant's permission and provided that at the end of five years "the Administrator of General Services shall destroy such tapes as I may direct" (J.A. 41).[11]

Thus appellant has opposed to the last ditch numerous attempts by committees of the Congress, or pursuant to

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[8]The major portion of his brief—82 pages, 12-16 and 52-130—is devoted to this argument.

[9]Br. 146; a concern not strong enough for him to warn them that he was taping these intimate conversations. J.A. 556.

[10]Br. 21; *see also* Question Presented No. 5 at Br. 4 and Br. 164-173. He presumably means those whose conversations he taped without their knowledge.

[11]Appellant's brief's description of the agreement (Br. 6) quite fails to mention these provisions. "J.A." refers to the two volume joint Appendix filed herein.

court subpoena in litigation, to obtain access to various records (J.A. 213-17; Intervenor Defendant's Evidentiary Submission, Item (3), *see* J.A. 297 (the full text is not reproduced in the Appendix); *Dellums v. Powell*, No. 76-1336 (D.C. Cir. Jan. 28, 1977)).[12] He has even opposed the publication and availability to the general public of portions of the tape recordings which are in the public domain by reason of their introduction as evidence in the criminal trial of his principal lieutenants, *United States v. Mitchell*, Nos. 75-1409, 75-1410 (D.C. Cir. Oct. 26, 1976).

Thus appellant claims as "personal" and "political" the most incriminating material: the "smoking gun" tape of the June 23, 1972, conversation in which he ordered an attempt to obstruct the FBI's investigation of the Watergate burglary (J.A. 522-25).[13] He would suppress memoranda reflecting abuse of the Internal Revenue Service to harass his political "enemies" (J.A. 577-78, 649-54) because disclosure of such matters would have a chilling effect (which appellant appears to regard as undesirable!) on future presidential advisors. He would suppress (without giving any reason) the record of his intention to "get" a distinguished attorney (J.A. 579-80, 585-86) and the record of the initiation of unlawful wiretaps on newspaper and television reporters (J.A. 557). It is for such purposes that he demands "sole discretion to make decisions with regard to the disposi-

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[12]Appellant argued in *Dellums* that the records should not be subject to discovery at all in any civil case. Brief for Appellant [Richard M. Nixon], at 11-26 (filed May 7, 1976).

[13]"It was the public disclosure of this tape which led to the resignation of President Nixon." *United States v. Haldeman*, Nos. 75-1381, 75-1382, 75-1384, 76-1441 (D.C. Cir. Oct. 12, 1976). The court of appeals' statement of "The Facts" in that opinion is reproduced as Appendix A to this brief. The quotation appears at App. A., p. 11 n. 15.

tion of [presidential] materials" (J.A. 565), denies the public's right to prompt disclosure of the records of his and his associates' acts that have been adjudicated as felonies (J.A. 545) and seems to claim a privilege to suppress evidence of wrongdoing—a word he has difficulty understanding (J.A. 552-53).

SUMMARY OF ARGUMENT

1. Appellant's papers and tapes contain the record of the severest constitutional crisis in 100 years, which forced appellant's flight from the Presidency to escape impeachment. The events of the years prior to his resignation led to numerous criminal convictions and nearly to appellant's indictment for obstruction of justice. In the course of these events, appellant engaged in misrepresentation and falsification of the records he now claims. The Act provides for public disclosure of the tapes and papers relevant to these crimes and abuses of office, §104(a)(1). The tremendous public interest in learning all the facts, to guard against a repetition, far outweighs the interests appellant claims support his exclusive control over what will be made public and what will be destroyed.

2. There is no separation of powers issue here. Both the Congress and the President agree that the Act is needed and that no interest of the executive branch is damaged. Appellant's claim of the right to invoke an asserted "presidential" privilege against the President is a claim to control the processes of government that our Constitution does not give a private citizen, even one who once occupied the office of President.

3. The Act is not a Bill of Attainder. To preserve the record of misconduct is not an attempted sanction for misconduct. The Act reaches not merely the papers and tapes produced by appellant, but those of numerous other former government officials. It protects and safe-

guards them against destruction or alteration by anyone and provides for their publication to the world at large—while at the same time specifically protecting the rights of appellant and of any other individual who would be affected by publication. The Act had no punitive intent; it does no more than provide a system for safeguarding property of the nation. It has no punitive effect; on the contrary, appellant is accorded rights to make use of the materials that are accorded to no other person. To deny appellant the power to conceal or destroy portions of the record of his conduct of office—which the Act does—is not a punishment.

4. Appellant, as a public official, gave up a large part of any privacy claim with respect to the records. The culling out of the records by archivists employed by the United States of America is an intrusion so minimal as not to come close to overriding the tremendous public interest in safeguarding and disclosure of the record for the public benefit. The public interest in preventing similar abuses of power in the future likewise overrides the minimal intrusion upon First Amendment rights.

ARGUMENT

I.

THE WATERGATE AFFAIR, APPELLANT'S ROLE IN IT AND HIS TAMPERING WITH THE WATERGATE RECORD AMPLY SUPPORT THE CONSTITUTIONALITY OF THE ACT.

Appellant argues that notwithstanding the numerous legislative expressions of concern for the preservation of the records at issue here for ongoing government needs and for history, the Act "was principally intended by Congress to force public disclosure of documents and recordings related to what has come to be known as the 'Watergate affair' " (Br. 10). He hints that if the Act had implemented only this intent and had "subjected to

permanent government control" only "Watergate" records and those "directly involving the exercise of presidential duties," his separation of powers argument might be seriously weakened (Br. 36, 117-18).[14] But he then turns about and pins his attainder argument to his assertion of a Watergate motive behind the Act, a legislative "allocation of personal blame" to him for it (Br. 16) and a taking of "his" materials (Br. 18, 138, 140) based on a finding that he was not "a wholly reliable custodian" (Br. 136-37).

Accepting appellant's argument at face value as hypothesis, the Act is amply justified on the basis he attacks. The purpose of disclosure of the record of Watergate by itself sustains the constitutionality of the Act, not least against the attainder claim. For there was indeed an articulated need for exercise of government control over the records—still undisclosed—of the role of appellant and his aides in the greatest constitutional crisis in a century, in the face of an agreement providing for appellant's total control and power of destruction and alteration of those records.

The Act lists, as the first of the purposes the Administrator is to serve in administering the Act, §104(a)(1), "the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term 'Watergate' " (Br. 4a). Disclosure to the public of the full record of the crimes and other abuses of power committed by the appellant and his confederates (in office and out) while he was President was thus undeniably one of the chief purposes of the Act:

[14] In fact, that is what the Act does; the remainder is to be returned to appellant, §104(a)(7), (Br. 4a).

> Clearly, it is in the public interest to provide general public access to the materials to assure a full and accurate account of 'Watergate' and to *provide a basis for legislation and executive action to prevent future 'Watergates' and clearly it is in the public interest to safeguard the historical record of the Presidency during the last five and one half years.*

H.R. Rep. No. 1507, 93d Cong., 2d Sess. 8 (1974) (emphasis added); *see also* S. Rep. No. 1181, 93d Cong., 2d Sess. 3 (1974). It was viewed as a "critical freedom of information" law, which was intended to carry out Congress' "responsibility to provide every possible opportunity for each citizen to confront the unscreened facts of the past to be better able to adopt the measures and the legislation necessary to stop future Watergates."

120 Cong. Rec. 37905 (1974) (remarks of Rep. McKinney). One Senator stated:

> [T]he public's interest in these tapes is particularly acute. The Watergate scandals represented an unprecedented . . . assault on our political system's most precious commodity—individual freedom. It is therefore important that these tapes be preserved pending their possible use in criminal trials . . . [and] to assure that, at some point in the future, there [will] be a complete understanding of how and why the Watergate tragedies occurred. The tapes no doubt provide the information necessary to that complete understanding.

120 Cong. Rec. 31549-50 (1974) (remarks of Sen. Nelson).

Appellant, while in office, had resisted such disclosure with every means at his command—including falsification and misrepresentation of the record. He falsified the transcripts of certain taped conversations which he released to the public in his own defense on April 30,

1974. *See, e.g.*, House Committee on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 1305, 93d Cong., 2d Sess. 128-31, 205 (1974); House Committee on the Judiciary, *Comparison of White House and Judiciary Committee Transcripts of Eight Recorded Presidential Conversations*, 93d Cong., 2d Sess. 3-5, 9, 10, 13, 35, 43, 45, 48, 59 (1974) [hereinafter *Comparison*]. He consistently misrepresented what was in the record. For example, on May 22, 1973, he assured the nation that he "took no part in, nor was I aware of, any subsequent [to June 17, 1972] efforts that have been made to cover up Watergate" and that "[*a*]*t no time* did I attempt, or did I authorize others to attempt, *to implicate the CIA in the Watergate matter.*" 9 Weekly Comp. of Pres. Doc. 693, 693 (May 22, 1973) (emphasis added). *Compare* App. A at 11 n.15. Then on September 5, 1973, appellant stated that "there is nothing whatever" in the tapes that would "reflect unfavorably on [his] Watergate position" and that "there is nothing whatever in the tapes that is inconsistent with" the May 22, 1973, statement. 9 Weekly Comp. of Pres. Doc. 1049, 1055 (Sept. 5, 1973). On April 29, 1974, appellant, describing the falsified transcripts he was releasing, declared to the nation: "As far as what the President personally knew and did with regard to Watergate and the coverup is concerned, these materials—together with those already made available—will tell it all." He assured the nation that "everything that is relevant"—relevant "to my knowledge or actions with regard to Watergate"—"is included." Address to the Nation, reprinted in House Committee on the Judiciary, *Statement of Information: Appendix I,*

Presidential Statements on the Watergate Break-In and its investigation, 93d Cong., 2d Sess., 84 (1974).

On May 22, 1974, appellant wrote, in rejecting the House Committee subpoena, for, *inter alia*, the June 23, 1972, tape: "The Committee has the full story of Watergate, insofar as it relates to Presidential knowledge and Presidential actions. Production of these additional conversations would merely prolong the inquiry without yielding significant additional evidence." 10 Weekly Comp. of Pres. Doc. 538, 538 (May 22, 1974). He repeated the statement to the Committee on June 9. 10 Weekly Comp. of Pres. Doc. 592, 593 (June 9, 1974).

His falsifications and misrepresentations were consistent, continuous and are not susceptible of any explanation save that they were part of a preconceived and carefully carried out plan. For example, on February 28, 1973, appellant raised the possibility of clemency for the Watergate burglars with John Dean. House Committee on the Judiciary, *Transcripts of Eight Recorded Presidential Conversations*, 93d Cong., 2d Sess. 40 (1974). On May 22, 1973, however, he assured the nation that "[a]t no time did I authorize *or know about any* offer of executive clemency for the Watergate defendants." 9 Weekly Comp. of Pres. Doc. 693, 697 (May 22, 1973) (emphasis added). Consistently, on April 30, 1974, he deleted the reference to clemency from the transcript he made public of the February 28, 1973, conversation. *Comparison, supra* at 9. Appellant was given the opportunity during his testimony in this action to defend or explain his falsification and misrepresentation of the record for public consumption. He was unable to do so and refused to answer any questions about it (J.A. 579-96).

Appellant was at pains to conceal his involvement in a conspiracy to obstruct justice by wholesale perjury, *see* App. A, *passim; Comparison, supra* at 31 (deletion of appellant's reference to Gordon Strachan stonewalling from transcript of March 13, 1973, conversation). He was at pains to conceal other violations of his trust as President: the perversion of the processes of agencies of government to "ruin" such political enemies as a major newspaper and a distinguished lawyer, *Comparison, supra* at 3-5, 10, 15 *(see,* for the facts, H.R. Rep. No. 1305, *supra* at 141-44); and the burglary of the office of a psychiatrist in an effort to find material to blacken the public image of another "enemy," Daniel Ellsberg, *Comparison, supra* at 59. *See,* for the facts, *United States v. Ehrlichman,* No. 74-1882, (D.C. Cir. May 17, 1976); *United States v. Barker,* No. 74-1883 (D.C. Cir. May 17, 1973).

Thus it is hardly surprising that a Congress which had determined that disclosure of the full record was imperative for the nation's future political health[15] should concern itself with guaranteeing the integrity of that record. *See* the district court's opinion (J.S. App. 18a-59a; Br. 132 n.60); *see also Hearings before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation,* 93d Cong., 2d Sess., 32 (1974). As Senator Javits said:

> A unique national emergency has been created, with reference to a particular President's official papers. . . .
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> . . . [Thus] we not only need a law, we need one that is going to be passed now, because certain rights affix to these papers under that [Nixon-Sampson] agreement which, unless we stay the movement of events, may very well fix and prejudice *what we, as a Congress, and with the President's concurrence, as a country,* think ought to be done about these papers.

120 Cong. Rec. 33859 (1974) (emphasis added).

To this appellant's response is to attempt to equate the record of this "long national nightmare"[16] with his successor's anti-inflation exhortations (Br. 118); and to assert the astonishing proposition that the purpose to disclose the record to educate the public and for legislative reform is simply illegitimate—that "[t]he criminal process provides whatever public remedy is appropriate to deal with concerns of this kind" *(id.).*

But the blinders which appellant manages to wear for the 178 pages of his brief will not make the Watergate affair into the WIN program. The Watergate affair—or rather affairs, *see* Watergate Special Prosecution Force, Report, *supra* note 1, at 50-85, 119-33,—resulted in[17]

- the conviction of one former Attorney General (Mitchell) for obstruction of justice and perjury;
- a guilty plea by another former Attorney General (Kleindienst) for failure to testify truthfully to a Senate Committee, reduced from a proposed charge of perjury;
- conviction of appellant's chief assistant (Haldeman) for obstruction of justice and perjury;

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[15] As Senator Cranston said: "The first step towards earning renewed confidence in government is to permit, consistent with the vital security interests of the United States, full and open access to all of the papers and tape recordings of the Nixon Administration. . . ." 120 Cong. Rec. 33873 (1974).

[16] 10 Weekly Comp. of Pres. Doc. 1023, 1024 (Aug. 9, 1974).

[17] *Id.* at 155-66; *see also* 76.

– conviction of appellant's other chief assistant (Ehrlichman) in two different trials, in one for obstruction of justice and making false statements, in another for conspiracy to violate civil rights (by burglary), and again making false statements;

– a guilty plea by appellant's Special Counsel (Colson) to obstruction of justice;

– a guilty plea by one of appellant's counsel (Dean) to obstruction of justice;

– a guilty plea by a White House assistant and Undersecretary of Transportation (Krogh) to conspiracy to violate civil rights (by burglary);

– guilty pleas by three of appellant's 1972 campaign aides (LaRue, Magruder, Porter) to various offenses in the Watergate cover-up;

– convictions of three burglars (Barker, De Diego, Martinez) for conspiracy to violate civil rights (by burglary);

– conviction of the General Counsel of appellant's campaign organization (Liddy) for conspiracy to violate civil rights (by burglary, both of Dr. Fielding's office and the Democratic National Committee) and wiretapping;

– conviction of six burglars, including the security specialist of appellant's 1972 campaign organization (McCord, Gonzales, Sturgis, and Barker, De Diego and Martinez again) of burglary, other offenses in the Watergate burglary and wiretapping;

– guilty pleas by 18 corporate officers and 18 corporations to making illegal campaign contributions;

– a guilty plea by a White House aide (Dent) and a fund-raiser (Gleason) to violations of the Federal Corrupt Practices Act;

– a guilty plea by appellant's personal attorney and a chief campaign fund-raiser (Kalmbach) to various offenses committed in raising funds for appellant's 1972 campaign;

– a guilty plea by a former Governor of Montana (Babcock) to an offense related to contribution of funds for the cover-up;

– a guilty plea by the Finance Chairman of appellant's 1972 campaign organization, a former Secretary of Commerce (Stans) to charges of failure to report, and acceptance of, illegal campaign contributions;

– conviction of a White House aide (Chapin) for lying to a grand jury about "dirty tricks" in appellant's 1972 campaign;

– a guilty plea by a Counsel to the President (appellant) (Morgan) to obstruction of the Internal Revenue Service (falsifying the date on a deed of gift by appellant to obtain a large income tax deduction);

– the naming of appellant as a co-conspirator to obstruct justice in *United States v. Haldeman* (App. A at 4 n.2); and

– the near-indictment of appellant for conspiracy to obstruct justice, postponed first because of constitutional doubts about indictment of a sitting President, then again in order not to delay the trial of Haldeman, Ehrlichman, Mitchell, et al., and finally averted only by the pardon of appellant. Watergate Special Prosecution Force, Report, *supra* note 1, at 119-24, 128-33.

Buckley v. Valeo, 424 U.S. 1 (1976), establishes the overwhelming public interest in disclosure of this record of corruption and abuse of our political institutions, unmatched in our history, for the purpose of promoting

the general health of those institutions. The Court there upheld the Federal Election Campaign Act's compulsory disclosure provisions as justified by the governmental interest in "the 'free functioning of our national institutions,' " 424 U.S. at 66, the need to gather "the data necessary to detect violations," 424 U.S. at 67-68, and as "part of Congress' effort . . . to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible." 424 U.S. at 76. This Court in *Buckley* approved, as a purpose of legislation, limitation of "the actuality and appearance of corruption" and prevention of the reoccurrence of "such pernicious practices" as "the deeply disturbing examples surfacing after the 1972 election," 424 U.S. at 26-27.

The Act challenged here provides for disclosure of the same collection of abuses for the same salutary reforming purpose. Sec. 104(a)(1), Br. 4a; H.R. Rep. No. 1507, 93d Cong., 2d Sess. 2 (1974); *Buckley v. Valeo*, 424 U.S. at 27 n.28, referring to *Buckley v. Valeo*, 519 F.2d 821, 839-40 and nn. 36-38 (D.C. Cir. 1975); H.R. Rep. No. 1305, 93d Cong., 2d Sess. 1-4 (1974); S. Rep. No. 1181, 93d Cong., 2d Sess. 3, 6 (1974).

II.

THE ACT IS NEITHER INCONSISTENT WITH THE SEPARATION OF POWERS PRINCIPLE NOR DOES IT INTERFERE WITH ANY RECOGNIZABLE PRIVILEGE

A. The short answer to appellant's lengthy disquisition on separation of powers is that there is simply no conflict between the legislative and executive branches and no encroachment by the one on the powers of the other. The Act was passed by the Congress and signed by the President. U.S. Const., art. I, §7. The possible conflict that might exist if there had been a veto and an override is not present here. Moreover, the executive branch, presided over by President Ford, who signed the Act, has vigorously defended it and upheld its consistency with the principle of separation of powers;[18] as still does the executive branch now presided over by President Carter. There is no "usurpation by Congress of the authority to control the operation of the President's Office" as in the Tenure of Office Act, as appellant boldly asserts (Br. 65).

B. There is here, then, no such clash as was presented in *United States v. Nixon*, 418 U.S. 683 (1974)[19] (Br. 67-72), and *Nixon v. Sirica*, 487 F.2d 700 (D.C. Cir. 1973) (Br. 72), between the judicial branch seeking to enforce a subpoena and the incumbent President seeking to resist it; or in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974), between one house of the Congress seeking to enforce a subpoena and the incumbent President seeking to resist it (Br. 72). Rather, this is an action against the very executive branch for whose powers the appellant here claims the right to speak. Appellant as a private litigant asks this Court to engage in a direct assault on the constitutional authority of its coordinate

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[18] Motion of the Federal Appellees to Affirm at 12-17.

[19] What this Court did in *United States v. Nixon* was of course a great deal more than merely to enforce the Special Prosecutor's subpoena. The Court was knowingly making the subpoenaed presidential tape recordings available to the House of Representatives for its impeachment inquiry, because then President Nixon had pointed this out to the Court in his brief, arguing that for this reason the subpoena should be quashed. Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 13-17, United States v. Nixon, 418 U.S. 683 (1974). This Court rejected the argument and ordered the subpoenaed materials produced. They were produced and turned over to the House of Representatives and appellant resigned.

branches; he asks this Court to disregard "the public position . . . that the executive branch may have taken in the Ford administration or that it may now take in the Carter administration" (Br. 77). He asks this Court to instruct the President how to manage the affairs of the executive branch to achieve the most effective flow of advice to the President *(id.)*.

C. Appellant therefore urges that there exists a "presidential privilege" that is personal to him, which followed him in his flight from office to escape impeachment, and which as a private citizen he may now invoke to prevent the Congress, the President and the people from examining the record of his conduct and misconduct in office. Neither this Court nor any other has ever recognized such a personal privilege. To do so now would not only depart radically from precedent but would clothe a former office holder with an attribute of monarchy that is wholly alien to our constitutional plan. Appellant makes the mistake, against which Justice Jackson warned, of "confounding the permanent executive office with its temporary occupant," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion); he appears to believe that he carried attributes of "the permanent executive office" with him when he fled as its "temporary occupant."

1. Appellant's essential premise is false. He argues (Br. 84-90) that this personal "presidential" privilege exists apart from and in a higher sphere than mere "executive" privilege. No court has ever so hinted.[20]

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[20]While he was in office, appellant himself consistently defended the privilege protecting presidential communications as "executive privilege." *See* Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974); Nixon v. Sirica, 487 F.2d 700, 705, 708 (D.C. Cir. 1973). *See also*

[footnote continued]

The privilege, announced in *United States v. Reynolds*, 345 U.S. 1 (1953), is constitutionally based, and the privilege for presidential communications is no higher, no greater than the privilege for any executive branch communications. It is, as appellant admits (Br. 86), and as this Court held in *United States v. Nixon*, 418 U.S. at 705, based on "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." It is, as appellant also admits, no more than "one species" of executive privilege (Br. 86 n.31). But it is not, as he goes on to assert (Br. 86) *"personal"* (emphasis in original). Appellant equates this high and important governmental privilege with the husband-wife, attorney-client and priest-penitent privileges and makes the ludicrous analogy of the incumbent President to a divorced spouse, a substitute lawyer and a "second priest" (Br. 86-87).

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appellant's Brief in Opposition at 4, 5, 10, 13, *passim* (filed Aug. 7, 1973), In re Grand Jury Subpoena duces Tecum, Misc. No. 47-73 (D.D.C. 1973); Reply Brief at 8, (filed Aug. 17, 1973) *id.*; Brief of Petitioner [Nixon] at 3, 65-71, 77, *passim*, Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973); Reply Brief of Richard M. Nixon, at 9-10, *id.*; Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at i, 50, 56, Senate Select Committee on Presidential Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974); Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 15, 19, 51, 56, 57, 60, 61, United States v. Nixon, 418 U.S. 683 (1974). Appellant's first suggestion of a distinction between "presidential" and "executive" privilege appears in his Reply Brief to this Court in United States v. Nixon, at pp. 14-17. The suggestion was advanced in support of the argument that the assertion of this privilege, as opposed to "ordinary" executive privilege, was not even reviewable. The argument was rejected and as we note in section 2, *infra*, the attempted distinction was ignored by this Court. *See also* Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d at 631 (citing this Court); Nixon v. Sirica, 487 F.2d at 713-716; United States v. Mitchell, 377 F. Supp. 1326, 1329 (D.D.C. 1974); Nader v. Butz, 60 F.R.D. 381, 383, 385 (D.D.C. 1973).

2. There is no such "personal," "presidential" privilege apart from the government's executive privilege. This Court opened its opinion in *United States v. Nixon* by referring to "the President's claims of absolute *executive privilege*. . . ." 418 U.S. at 686. It then pointed out that the district court had "rejected the contention that the Judiciary was without authority to review an assertion of *executive privilege* by the President," and that "the District Court held that the judiciary, not the President, was the final arbiter of a claim of *executive privilege*." 418 U.S. at 689. The court described "the Special Prosecutor's authority to test any claim of *executive privilege* in the courts." 418 U.S. at 695 n.9 (emphasis added throughout). Moreover, this Court's analysis of the claim of privilege in *United States v. Nixon* is the same analysis made of claims of executive privilege advanced in other cases which this court cites, 418 U.S. at 708 n.17, and in *United States v. Reynolds*, 345 U.S. 1 (1953), which this Court relies upon, 418 U.S. at 710-11.

3. The privilege does not belong to the appellant. Unlike the husband-wife, priest-penitent and lawyer-client privileges (*see* Br. 86-87), executive privilege is not personal to an individual. It belongs to the government and is recognized in order to protect continuing interests of the government. *United States v. Reynolds*, 345 U.S. at 7. The privilege derives from "the necessity for protection of the *public interest* in candid, objective . . . opinions in Presidential decisionmaking" and is therefore "fundamental to the operation of Government" *United States v. Nixon*, 418 U.S. at 708 (emphasis added). This Court's citation in *United States v. Nixon* of the standard executive privilege cases recognizes that the privilege "is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold

office." *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.). As this Court emphasized in *United States v. Nixon*, it is the President in office who has the power and the responsibility to claim executive privilege for presidential communications:

> If *a President* concludes that compliance with a subpoena *would be injurious to the public interest* he may . . . invoke a claim of privilege. . . . Upon receiving a claim of privilege *from the Chief Executive*, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged. . . .

418 U.S. at 713 (emphasis added). There is no place under our Constitution for any person except the present holder of the office of President to determine by invocation of the privilege, that disclosure "may be injurious to the public interest." [21]

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[21] Appellant so argued while he was still in office. Brief of Richard M. Nixon in Opposition to Plaintiffs' Motion for Summary Judgment at 60, Senate Select Committee on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974):

> Discussions of this kind are regarded as privileged . . . since it is the public that is served when those who represent it are able to make important decisions with the wisdom that only open and frank discussion can provide.

Brief for the Respondent, Cross-Petitioner Richard M. Nixon, President of the United States at 53, United States v. Nixon, 418 U.S. 683 (1974):

> Any determination concerning the disclosure of presidential documents, necessarily requires the exercise of the unique discretion and expertise of the Chief Executive, for such a decision involves "considerations of policy, considerations of extreme magnitude, and certainty, entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall.

[footnote continued]

4. It is obvious that where the invocation of a claim of privilege must be based on important matters of national interest, only the responsible official, not a private citizen who once held the office, can be vested with authority to invoke the privilege. The incumbent is presumed, by virtue of the trust of his office, to consider the national interest only and not his own interest. *See* Justice Reed's holding in *Kaiser*, 157 F. Supp. at 944. A former official is entitled to no such presumption because he is no longer subject to such a duty of trust. Guardianship of the public interest cannot be reposed in a private citizen whose responsibility for the welfare and governance of our nation has ceased—whether honorably, or, as in this case, under the gravest charges of attempted subversion of our system of government.

III.

THE ACT IS NOT A BILL OF ATTAINDER OR A BILL OF PAINS AND PENALTIES

Appellant's bill of attainder claim hobbles on three legs: (1) that the Act is limited to the papers and tapes of his administration, not those of other Presidents, and only to his tapes and papers, not those of other officials (Br. 130-31); (2) that in lodging custody with the Administrator of General Services, the Act carries the "implication" that appellant was "blameworthy" (Br. 132) and therefore has a punitive intent, and (3) that the Act imposes on him the "punishment" of "confiscation,"

(3 U.S.) 199, 260 (1796). Only the President is in a position to determine which communications must be maintained in confidence, for the public interest in this matter is a judgment only the President can make. It involves a complex blend of policy, perspective, and knowledge uniquely within the province of the President and the executive branch.

that *his* "property . . . has plainly been taken" (Br. 140-41).

A. Appellant argued the first of his points to the district court as a denial of equal protection. He now abandons his equal protection claim but adds this point to his bundle of attainder arguments. The district court disposed of the argument by pointing out that appellant's materials "were in a unique status" (J.S. App. 93a), that under his September 7, 1974, agreement there was no assurance that the materials would be preserved as those of other Presidents had been (*id.* at 94a-95a) and suggesting that there was "adequate basis for concluding that Mr. Nixon might not be a wholly reliable custodian of the materials at issue" (*id.* at 96a).

The point has even less weight in support of an attainder argument than it did in support of the abandoned equal protection argument. As this Court has stated, "underinclusiveness" is not "a necessary feature" of a bill of attainder; "[t]he vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." *United States v. Brown*, 381 U.S. 437, 449 n.23 (1965).

1. That the Act did not immediately provide similar safeguards for materials of other administrations is irrelevant. The most urgent concern was to protect those records in immediate danger of destruction.[22] Legislation

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[22] As the chairman of the House Government Operations Committee noted:

> Under normal circumstances, such legislation would not be necessary. Recent Presidents have all placed their papers in the public domain, so those engaged in historic research may have full access to the materials. The Government Operations Committee has enacted legislation which establishes Presidential libraries to house such papers.

[footnote continued]

"is not to be overthrown because there are other instances to which it might have been applied." *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400 (1937) (citations omitted). Reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others...." *Geduldig v. Aiello,* 417 U.S. 484, 495 (1974), *quoting Williamson v. Lee Optical Co.,* 348 U.S. 483, 489 (1955). The law is not limited to either "attacking every aspect" of the problems pertaining to the materials of every federal official "or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

2. The claim that "the Act does not reach the material maintained by any other public official" who was involved in Watergate (Br. 131) is without basis.[23]

The Presidential libraries law places an obligation upon the Administrator of General Services to negotiate with a former President *not for ownership but over the best means to preserve and protect the papers for the ultimate benefit of the public.* If the letter and spirit of the law, as well as past precedent, had been followed, there would be little need for us to legislate here.

120 Cong. Rec. 37904 (1974) (remarks of Rep. Brooks) (emphasis added).

[23]Appellant's citation to the Legal Adviser's memorandum (Br. 130, n.59) ignores the ensuing controversy over whether former Secretary Kissinger's notes of conversations with foreign leaders are his personal property, are covered by the Act or are government records under 44 U.S.C. §§3101-06, 3301-14. On January 4, 1977, the Archivist of the United States asserted in a letter to Secretary Kissinger the authority and the duty to determine whether the Kissinger notes "are, indeed, personal property or whether some portions of them may be Federal records or Nixon historical materials" covered by the Act. On February 11, 1977, the Archivist wrote again, quoting the opinion of the General Counsel of GSA that:

[footnote continued]

The Act, section 101(a), covers "all original tape recordings of conversations ... recorded *by any officer or employee of the Federal Government* and which—(1) involve former President Richard M. Nixon *or other individuals* who, at the time of the conversation, *were employed by the Federal Government;* ...." (emphasis added). The Act covers all "Presidential historical materials," §101(b)(1), which includes "the files of individual staff members" (Br. 26) including such aides and co-conspirators as Messrs. Haldeman, Ehrlichman, Dean, et al. (J.A. 405); *United States v. Ehrlichman,* No. 74-1882, slip op. at 38 (D.C. Cir. May 17, 1976). The files of all other federal government officials, whether involved in Watergate or not, are government records already within the full control, custody and possession of the government. 44 U.S.C. §§3101-06, 3301-14.[24]

The Archivist of the United States has the authority and responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts and related documents created or received by Former Secretary of State and Assistant to the President for National Security Affairs Henry A. Kissinger during the course of his service in those positions.

The issue is now in litigation. Reporters Committee for Freedom of the Press v. Vance (D.D.C., C.A. No. 77-0220).

[24]Section 3301 of Title 44 defines government records as:

all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.

B. Most of appellant's attainder argument (Br. 131-40) is devoted to his second point, that the Act was based on a determination that appellant was an "unreliable custodian" of the records and that it consequently embodied a finding of guilt for which it imposed punishment.

It is undeniable that the Act affected, by eliminating, a power over the records—power to destroy, power to suppress from public view—which appellant claimed to have by virtue of the September 7, 1974, agreement with GSA. To this extent it might be argued that the Act deprives appellant of something. To this extent, however, it does not single him out. By placing the records in government control, it safeguards them from destruction by anyone. Moreover, while a "bill of attainder is a legislative act which inflicts punishment without a judicial trial," *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866),

> [t]he fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation.

United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring).

The deprivation here is not based on a legislative determination either of guilt or of punishment. It is, rather, a "relevant incident to a regulation of a present situation." *DeVeau v. Braisted*, 363 U.S. 144, 160 (1960).

The Act dealt with the fate of the records of appellant's administration, nothing else. Congress had before it the September 7, 1974, agreement which created the possibility of the concealment, and eventual

destruction, of the most telling evidence of a profound national scandal. The agreement ensured that no one except appellant and those chosen by him would ever have access to the full and undistorted record. Appellant's excerpts from the legislative history show no more than concern about distortion and destruction of that record and how best to preserve the record for the nation's education. *See* Br. 132 n.60; *see also* pp. 14-15 *supra*. The House, the Senate and the President indeed, and properly, had Watergate in mind when they decided to ensure that this record remained intact and in the government's hands. *See* pp. 14-15 *supra*. There is nothing in the Act or its history, and appellant points to nothing, supporting in the remotest way an intent or purpose, however veiled, to penalize appellant for anything he might have done.[25] The Act and its history cry out, rather, with apprehension for the future safety of the record, with provision to ensure that safety and with purpose to open that record to the nation for its beneficent effect on our political system. The people are entitled to know the facts. Exposure of the truth about Watergate is not the equivalent of punishment of those who were involved. This Court has repeatedly emphasized that "informed public opinion is the most potent of all

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[25] As the district court held (J.S. App. 100a-101a):

> There is no evidence presented to us, nor is there any to be found in the legislative record, to indicate that Congress' design was to impose a *penalty* upon *Mr. Nixon*, by depriving him of custody and control of the disposition of the materials at issue, as punishment for alleged *past* wrongdoings. There is, however, ample evidence that Congress cared about *regulating* how the *materials* would be treated in *the future* in order to ensure that such treatment will be consistent with Congressional perceptions of the public interests. (emphasis in original) (footnote omitted).

restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936), *quoted with approval in Buckley v. Valeo*, 424 U.S. 1, 67 n.79 (1976) (*see* pp. 21-22 *supra*). As long as the Act was not intended to punish, but "to devise what was felt to be a much needed scheme of regulation," *DeVeau v. Braisted*, 363 U.S. at 160, the statute cannot be characterized as an unlawful attainder. The Act's designation of the Administrator of General Services to be custodian of the records in no way implies any guilt of appellant—or of any other person who created records covered by the Act, or of any other person not designated as custodian. The Administrator has custody of the materials of many Presidents, has the aid of trained archivists, has storage facilities and was therefore the obvious designee.

C. *United States v. Brown*, 381 U.S. 437 (1965), in no way supports a finding of attainder here. *Brown* struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act) which made it a crime, punishable by fine and imprisonment, for a member of the Communist Party to serve as an officer or an employee of a labor union. 381 U.S. 438 n.1. The *Brown* Court took pains to note that, in its view, "[t]he purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as *guilty of subversive acts and associations*. . . ." 381 U.S. at 460 (emphasis added). The Court noted that "[t]he moment §504 was enacted, respondent [a labor union leader] was given the choice of declining a leadership position in his union or incurring criminal liability [*i.e.*, fine or imprisonment]." 381 U.S. at 452. It contrasted section 504 with section 32 of the Banking Act of 1933, which the Court found "incorporates no judgment censuring or condemning any man or group of men." *Id.* at 453-54.

While *Brown* holds that "punishment" in attainder analysis is not limited to "retribution" but also may include "preventive" legislation, a legislative judgment of "guilt" remains an essential element. The punitive effect of the legislation must be, as in *Brown*, related to the judgment—a "*purge* of those whom Congress regards as *guilty*." 381 U.S. at 460 (emphasis added). There is nothing in the Act challenged here or in its legislative history embodying a finding of "guilt" on appellant's part.[26]

Moreover, the *Brown* Court recognized the lack of any rational relationship, other than Congress' *ipse dixit*, between membership in the Communist Party and a propensity to cause political strikes. 381 U.S. at 455-56. The Court referred to such a congressional "suggestion" as a "fallacy." *Id.* at 455. It noted that whether legislation amounts to an attainder would depend on whether "there existed any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate." *Id.* at 466. Here, contrariwise, as we have spelled out at pp. 13-22 *supra*, there was a "demonstrable relationship" between the record appellant had made concerning the presidential tapes and papers while he was in office and the "evil

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[26] Contrary to appellant's assertion, *Brown* did not hold that "punitive intent" is "*not* an essential element of a bill of attainder" (Br. 139; emphasis in original). It did no more than find that punitive intent, while necessary, could be inferred. As Justice White pointed out in his dissent, the Court concluded that §504 "must be deemed to have been adopted with a punitive purpose." 381 U.S. at 474. *See also* Comment, The Supreme Court's Bill of Attainder Doctrine: A Need For Clarification, 54 Calif. L. Rev. 212, 231 (1966) (criticizing the majority's reading of a punitive rather than regulatory purpose into §504); 30 Alb. L. Rev. 162, 163 (1966) (concluding that the court "found that the underlying motive of §504 was to punish because it was intended to purge Communists from the governing boards of labor unions").

Congress sought to eliminate," *i.e.*, the danger of the destruction of the materials, their concealment forever from public view or their publication in distorted form. *See Cummings v. Missouri*, 71 U.S. at 320.

Thus Congress, consistent with the Bill of Attainder Clause and *Brown*, might indeed have relied on appellant's being an "unreliable custodian" as a basis for enacting legislation to prevent destruction or alteration of the historical and Watergate record. But it did not do so, and appellant's argument (Br. 136-39) that Congress should have passed a statute generally applying to "unreliable custodians" and have the courts decide whether he was one, falls of its own weight.[27]

The focus of the Act is on the safety and the processing of the records, the public disclosure of those related to Watergate to which the public should have prompt access, together with protection of the rights of individuals and with special provisions favoring the appellant, §§102(c), 104(a) (Br. 3a-4a). This is the "object on which the enactment in question was focused," *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960), not on appellant. Thus, unlike any bill of attainder that has come before the courts, it does not address itself to an individual or a group and visit consequences upon them. The Act, unlike section 504, "incorporates no judgment censuring or condemning any man or group of men." *United States v. Brown*, 381 U.S. at 453-54.

Brown is inapposite here for another reason. In discussing application of the Attainder Clause to preventive legislation, *Brown* cites the traditional purpose of the clause, to prevent the legislative proscription of politically unpopular groups or causes. 381 U.S. at 453, 458-60. *See also United States v. Lovett*, 328 U.S. 303 (1946). Here there is no such purpose or effect. Government control and processing of the records and their prompt publication in no way condemn appellant's associations or his political beliefs.

[27] The argument is based on one aspect of the *Brown* Court's analysis—that while Congress could set rules of general applicability intended to prevent subversives from holding sensitive positions, it could not designate those persons, but had to leave that task to the courts. 381 U.S. at 461.

As the Court held in *Flemming v. Nestor*, 363 U.S. at 617, "only the clearest proof could suffice" to establish that Congress' purpose was punitive rather than regulatory. *See United States v. Brown*, 381 U.S. at 476 (dissenting opinion). Here the proof is clear that there was no punitive intent, that the purpose of the Act was entirely regulatory—to provide for the protection, processing and publication of the records.

D. Another necessary element of a bill of attainder is that the enactment inflict punishment—that is, have a punitive effect. The Act imposes no significant disability of any kind, much less punishment, on appellant. As noted, part B *supra*, it safeguards the records against the whole world.

Whether the Act has a punitive impact within the meaning of the Attainder Clause depends on whether it imposes a significant "disability or restraint" of the kind which has "historically been regarded as punishment" and which serves the "traditional aims of punishment—retribution and deterrence." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1969) (footnotes omitted). The Act has none of these characteristics.

1. The Act has nothing in common with the traditional forms of deprivation associated with bills of attainder, such as permanent exclusion from a professional occupation or from public office, *Cummings v.*

Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866); denial of compensation for services rendered to the United States, *United States v. Lovett*, 328 U.S. 303 (1946); denial of the right to hold a particular job, *United States v. Brown*, 381 U.S. 437 (1965), or the more drastic measures historically imposed by bills of attainder: death, banishment, imprisonment or exile.

By contrast, here any "restraints" placed on appellant are minimal. Contrary to appellant's assertion (Br. 140), he has not "been deprived for more than two years of ready access to" his materials, nor has he "had taken from him the entire record of this period of his life." As the district court pointed out (J.S. App. 13a n.7), the Act accords appellant an unlimited right to inspect, copy, quote from or use any of the materials in any way he desires. *See* §102(c), Br. 3a. It thus gives appellant an opportunity to reap a substantial financial benefit from any written or oral work produced as a result. The examination of the records of appellant's administration by discreet and trained archivists—albeit archivists "whom he does not know" (Br. 140)—constitutes no sanction or personal disability whatsoever and has nothing in common with the loss of fundamental civil or political rights imposed by every bill of attainder so labelled by this Court. By employing professional archivists whose job it is routinely to screen both private and official documents,[28] the Act guards against any excessive intrusion into appellant's personal affairs. Section 104(a)(5) provides for the Administrator to promulgate regulations protecting "any party's opportu-

[28]Appellant's attacks on the integrity of the government archivists have not produced a scintilla of evidence to support his claim that their objectivity may be open to question.

nity to assert any legally or constitutionally based right or privilege" denying or limiting access to the materials (Br. 4a). Section 104(a)(7) directs that appellant be given "sole custody and use" of those materials "not likely to be related to . . . [Watergate] and . . . not otherwise of general historical significance" *(id.)*.[29]

2. Nor is there here a punishment by "confiscation of property" (Br. 140). Appellant bases his claim to "own" the materials on the separation of powers doctrine (Br. 90-102). He argues that "the right to control access to and disposition of the materials of his office—is rooted in the Constitution itself" (Br. 94). Various "other incidents of common law ownership" are "engrafted" onto this constitutionally based "ownership" (Br. 93). But if appellant's claimed property rights are an appurtenance of office, conferred by the Constitution for high public purposes, then a "taking" of that bundle of rights would not be confiscation of personal property, any more than would be the government's removal of communications equipment from, or the dismantling of a helicopter pad on, a former President's private property when he leaves office and no longer has need of it.

Moreover, the provision in the Act for just compensation in the event that the Act is found to deprive appellant of private property (§105(c), Br. 7a) eliminates any punitive effect that a taking of such private property would have. The purpose of awarding compensation is to make legally whole the one whose property has been

[29]This provision was designed to guarantee that appellant receive permanent and exclusive custody and disclosure rights over various categories of memorabilia "of a purely personal nature such as records from Mr. Nixon's private law practice or [letters from] persons corresponding with his family." 120 Cong. Rec. 37903 (1974) (Rep. Brademas).

taken, and to avoid any punitive impact. When just compensation is paid, the owner stands "in the same position monetarily as he would have occupied if his property had not been taken." *United States v. Reynolds*, 397 U.S. 14, 16 (1970); *accord, United States v. Miller*, 317 U.S. 373-74 (1943).

In any event, there has been no confiscation of property here because the materials at issue never belonged to appellant in the first place. We rely on and incorporate here the argument of appellee Reporters Committee for Freedom of the Press, et al.

In short, the emphasis of the regulatory scheme is not on punishment, but preservation of the records. It provides protection of appellant's interests consistent with that preservative intent. The efforts made to recognize and respect appellant's legitimate interests in the materials, even if not wholly satisfactory to him, are specifically designed to minimize any adverse impact of the Act.[30]

IV.

NO FIRST OR FOURTH AMENDMENT RIGHTS OF APPELLANT ARE AFFECTED BY THE ACT

Appellant opens his privacy and free speech argument with the concession that by "voluntary entry into public life an elected official surrenders certain privacies" that private citizens do not surrender (Br. 141). He ignores,

[30] *See, e.g.*, 120 Cong. Rec. 33875 (1974) (remarks of Sen. Huddleston that the interest of Congress in avoiding further "embarrassment, humiliation or suffering" to appellant underlies the provisions affording "the former President every protection and consideration while at the same time protecting the right of the public to be completely informed about a matter that affects us all so intimately").

however, the recent cases decided by this Court which implement that principle and which defeat his claim.

A. Privacy interests that are inviolate for a private citizen give way when they are claimed by a holder of a public office and clash with a public interest related to that office. *Kelley v. Johnson*, 425 U.S. 238, 244-49 (1976). Appellant, of course, has rights of privacy "with respect to certain basic matters of procreation, marriage and family life," 425 U.S. at 244, *cf. Paul v. Davis*, 424 U.S. 693, 713 (1976). But when he assumed the Presidency, he gave up his absolute rights of privacy as one of "the citizenry at large," *Kelly v. Johnson*, 425 U.S. at 245, and the Act's provision for the use of archivists to cull out and return to him any purely private records is justified, indeed necessary and traditional for a President, even though it would not be justified for a private citizen. In short, the Act and the archival processing it provides "touch" appellant as a former government official with respect to the records of his tenure, *id.*, and he has no "legitimate expectation of privacy" in the "business records" of the conduct of his Presidency, for which he "can assert neither ownership nor possession." *Cf. United States v. Miller*, 425 U.S. 435, 440, 442 (1976).

B. Independent processing of personal files to ensure that privacy is protected, as contemplated by the Act (*see* J.S. App. 24a-25a), was approved by the Court in *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). The Court there adopted a balancing test to implement the policy of the Freedom of Information Act "to open public business to public view when no 'clearly unwarranted' invasion of privacy will result," 425 U.S. at 381. The Court noted, in approving *in camera* judicial review

to delete identifying details from files affected with a public interest,

> [t]o be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts.

425 U.S. at 381-82 (citations omitted). If anything, professional archivists are preferable to busy district judges to process records for the twin purposes of protecting privacy and opening "public business to public view."

C. Appellant's assumption of office likewise reduces his right to First Amendment protection of political activities that are inextricably related to the conduct of such office. The right of free communication guaranteed in public streets and parks may be limited on government facilities, *cf. Greer v. Spock*, 424 U.S. 828, 838 (1976); an army officer must accept a restriction on First Amendment protections in relation to his responsibilities as an officer, *cf. Parker v. Levy*, 417 U.S. 733, 758, 761 (1974), and civilian government employees must accept restrictions on their political rights, *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 556 (1973). As Justice Powell noted in *Greer*, such First Amendment rights "may be circumscribed when necessary to further a sufficiently strong public interest," as long as the infringement "is limited narrowly to the protection of the particular Government interest involved," 424 U.S. at 842, 847 (concurring opinion). Justice Powell no more than echoed the unanimous holding of the Court in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), that

> [e]ven a " 'significant interference' with protected rights of political association" may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. (citations omitted).

D. Finally, while citing *Buckley* insofar as the Court there struck expenditure limitations (Br. 166-167), appellant ignores *Buckley's* upholding the constitutionality of campaign contribution and expenditure disclosure provisions, much more analogous to the Act at issue here. As we noted, pp. 21-22 *supra*, *Buckley* approved these sections of the Federal Election Campaign Act despite the recognition that "disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," 424 U.S. at 64, because the purpose of public education about abuses such as Watergate outweighed any infringement on First Amendment rights.

CONCLUSION

None of appellant's arguments, or all of them together, override the important public interests served by the Act. The Act is constitutional and the judgment below should be affirmed.

Respectfully submitted,

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March 3, 1977

APPENDIX

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1381

UNITED STATES OF AMERICA

v.

HARRY R. HALDEMAN, APPELLANT

No. 75-1382

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, APPELLANT

No. 75-1384

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, APPELLANT

No. 76-1441 *

UNITED STATES OF AMERICA

v.

HARRY R. HALDEMAN and
JOHN D. EHRLICHMAN, APPELLANTS

Appeals from the United States District Court for the District of Columbia

(D.C. Criminal No. 74-110)

Argued January 6, 1976

Decided October 12, 1976

John J. Wilson, with whom *Frank H. Strickler*, *Ross O'Donoghue*, and *George A. Fisher* (at the time the case was argued) were on the brief, for appellant in No. 75-1381. *Messrs. Strickler* and *O'Donoghue* were on the brief for appellant Haldeman in No. 76-1441.

William Snow Frates, with whom *Andrew C. Hall* was on the brief, for appellant in No. 75-1382. *Messrs. Frates* and *Hall* were on the brief for appellant Ehrlichman in No. 76-1441.

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* For the reasons stated in its memorandum opinion, we find that the District Court did not abuse its discretion in denying the motion of appellants Haldeman and Ehrlichman for a new trial. The judgment of the District Court in No. 76-1441 is therefore affirmed.

William G. Hundley, with whom *Plato Cacheris*, *Robert S. Erdahl*, and *Cary Mark Feldman* were on the brief, for appellant in No. 75-1384.

Peter M. Kreindler, Counsel to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor at the time the brief was filed, *Peter F. Rient*, *Kenneth S. Geller*, *Maureen E. Gevlin*, *Jay B. Stephens*, and *Judith A. Denny*, Assistant Special Prosecutors, and *Sidney M. Glazer*, Attorney, Department of Justice, were on the brief, for appellee in Nos. 75-1381, 75-1382, and 75-1384. *Charles F. C. Ruff*, Special Prosecutor, and *Peter M. Kreindler* and *Paul Hoeber*, Special Assistants to the Special Prosecutor, were on the brief for appellee in No. 76-1441.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, LEVENTHAL, ROBINSON, and MACKINNON, *Circuit Judges*, sitting *en banc*.

Opinion for the court *per curiam*.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

PER CURIAM [1]: On March 1, 1974 a grand jury in Washington, D.C. returned a 13-count indictment against seven individuals. It charged what amounted to an unprecedented scandal at the highest levels of government, for most of the defendants had held major positions in the Nixon administration. Charged were John N. Mitchell, former Attorney General of the United States and later head of the Committee to Re-elect the President (CRP), President Nixon's campaign organization for the 1972 election; Harry R. Haldeman, former Assistant to the President, serving basically as chief of the White House

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[1] The opinion in this case is issued *per curiam* not because it has received less than full consideration by the court, but because the complexity of the issues raised on appeal made it useful to share the effort required to draft this opinion among the members of the court.

staff; John D. Ehrlichman, once Assistant for Domestic Affairs to the President; Charles W. Colson, former Special Counsel to the President; Robert C. Mardian, earlier an Assistant Attorney General, then an official of CRP; Kenneth W. Parkinson, hired in June of 1972 as CRP's lawyer; and Gordon Strachan, once a staff assistant to Haldeman at the White House.[2] The counts of the indictment embraced conspiracy, 18 U.S.C. § 371 (1970), obstruction of justice, *id.* § 1503, and various instances of false statements made to the Federal Bureau of Investigation (FBI), *id.* § 1001, to the grand jury, *id.* § 1623, and to the Senate Select Committee on Presidential Campaign Activities, *id.* § 1621.[3] J.A. 65-112.

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[2] The grand jury also authorized the Special Prosecutor to name 18 individuals as co-conspirators: Bernard L. Barker, William O. Bittman, John D. Caulfield, John W. Dean, III, Virgilio R. Gonzalez, Sally Harmony, Dorothy Hunt, E. Howard Hunt, Jr., Herbert W. Kalmbach, Fred C. LaRue, G. Gordon Liddy, Jeb S. Magruder, Eugenio R. Martinez, James W. McCord, Jr., Richard M. Nixon, Paul O'Brien, Frank L. Sturgis, and Anthony T. Ulasewicz. J.A. 483. Several of these individuals have been convicted in other cases of various offenses connected with the Watergate incident.

[3] Count 1 charged all defendants with conspiracy to obstruct justice, to make false statements to a government agency, and to defraud the United States by corrupting the operation of the Central Intelligence Agency (CIA), the FBI, and the Department of Justice. It detailed 45 overt acts allegedly committed in furtherance of the conspiracy by one or more co-conspirators. Count 2 charged all but Mardian with the substantive offense of obstruction of justice. Counts 3 through 6 charged Mitchell with making various false statements—one to the FBI, on two occasions to the grand jury, and once before the Select Committee. Counts 7 through 9 charged Haldeman with three instances of making false statements before the Select Committee. Counts 10 through 12 alleged that Ehrlichman had made false statements, once to the FBI and twice before the grand jury. Finally, Count 13 charged Strachan with making a false statement to the grand jury. J.A. 65-112.

Five defendants ultimately went to trial together before Judge Sirica; prior to trial the charges against Colson had been dropped after his guilty plea in another case, and the case against Strachan was severed with the Government's consent due to legal problems stemming from prior grants of use immunity.[4] The jury acquitted Parkinson, found Mardian guilty of conspiracy, the only offense with which he was charged, and convicted Mitchell, Haldeman, and Ehrlichman of both conspiracy and obstruction of justice, as well as all the individual perjury counts submitted.[5] Sentences of imprisonment were imposed,[6] and those convicted have appealed. We deal in the instant appeals only with the convictions of Haldeman, Ehrlichman, and Mitchell.[7] We affirm.

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[4] The charges against Strachen were later dismissed pursuant to FED. R. CRIM. P. 48(a).

[5] *See* note 3 *supra*. Counts 3 and 10, charging Mitchell and Ehrlichman respectively with false statements to FBI agents, had been dismissed by the court at the close of the Government's case.

[6] Mardian received a sentence of 10 months to three years in prison. Mitchell, Haldeman, and Ehrlichman were sentenced to concurrent terms of 20 months to five years on Counts 1 and 2, and to concurrent terms of 10 months to three years on each perjury count on which they were convicted. The perjury sentences were to run consecutive to the sentences for conspiracy and obstruction of justice, making a total of two and a half to eight years in prison for each of these three defendants.

[7] The statement of facts in Part I of this opinion gives a general summary of the evidence against all four individuals. Mardian's appeal, however, was argued separately before this court and is treated in a separate opinion issued today. *United States* v. *Mardian*, No. 75-1383.

I. THE FACTS

Evidence at trial [8] consisted of both direct testimony and actual tape recordings of key conversations of the co-conspirators. It established a wide-ranging conspiracy designed to impede a grand jury investigation into the break-in at the Democratic National Committee (DNC) headquarters in the Watergate Office Building in Washington, D.C., and into other related matters.

A. *The Gemstone Plan*

In the early morning hours of June 17, 1972, roughly four and a half months before the presidential election, police discovered five men inside the DNC offices carrying electronic equipment, cameras, and large sums of cash. These were no ordinary burglars. They were operating as part of a larger CRP intelligence gathering plan code-named Gemstone, and they had been in the DNC offices once before, in late May. Their mission this time was to fix a defective bugging device placed during the prior entry on the telephone of the DNC chairman; these orders had come after high officials at CRP expressed dissatisfaction with the information theretofore produced by the expensive Gemstone.[9] Tr. 2649, 4143-4147, 4519-4521.

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[8] Since none of the three appellants challenges the sufficiency of the evidence to sustain the jury verdict, we summarize here only the major events of the conspiracy. Moreover, it is well settled that on appeal we are to set forth the evidence in the light most favorable to the jury's verdict. *United States* v. *Clayborne*, 166 U.S.App.D.C. 140, 142, 509 F.2d 473, 475 (1974). *See, e.g., Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *DeLoach*, —— U.S.App. D.C. ——, ——-—— & n.2, 530 F.2d 990, 991-992 & n.2 (1975).

[9] The burglars were James McCord, Bernard Barker, Eugenio Martinez, Virgilio Gonzalez, and Frank Sturgis. Tr. 4143. They, along with E. Howard Hunt, Jr. and G. Gordon Liddy, were convicted of burglary, conspiracy, and unlawful endeavor to intercept oral and wire communications. All but

Gemstone was the brainchild of G. Gordon Liddy, CRP's general counsel, who had been hired in late 1971 with the expectation that he would develop plans for gathering political intelligence and for countering demonstrations. Tr. 2625-2628, 4507. That expectation was abundantly fulfilled. Collaborating with E. Howard Hunt, Jr., a former CIA agent whom Liddy knew well from previous ventures undertaken at White House behest,[10] Liddy went to work on his assignment. In two meetings held during January and February 1972 he presented his initial Gemstone plan and budget to Mitchell, at that time Attorney General but even then the functional head of the Nixon re-election effort. These meetings were attended by Jeb Stuart Magruder, Deputy Director of CRP and later an important Government witness, and John W. Dean, III, counsel to the President and eventually the Government's prime witness at trial.[11] At these first meetings Liddy failed to win approval, Mitchell indicating that the original million-dollar budget had to be scaled down.[12] Tr. 2628-2634, 4507-4513. By March 30, however, Liddy had pared his budget to $250,000, and Mitchell had resigned his duties as Attorney General to become head of CRP in title as well as function. On that date, in Key Biscayne, Florida, Magruder obtained Mitchell's approval for Gemstone in a meeting attended

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McCord and Liddy were convicted on pleas of guilty. *See United States* v. *Liddy*, 166 U.S.App.D.C. 95, 509 F.2d 428 (1974).

[10] Tr. 7662-7664. Hunt still maintained an office in the Executive Office Building next door to the White House.

[11] Both Dean and Magruder were convicted of conspiracy on pleas of guilty entered before the instant trial began. Both served prison terms for their roles in the cover-up. Tr. 3330-3331, 4503.

[12] These early proposals included plans to kidnap demonstration leaders and to plant call girls with Democratic officials. Tr. 4117-4120.

only by Mitchell, Magruder, and Fred LaRue, a close personal friend to Mitchell then serving as a top campaign aide.[13] Tr. 3276-3277, 4514-4517, 4638-4639.

Magruder, who had once served on Haldeman's staff, was keeping the White House informed of campaign developments, including Gemstone plans and operations, by regularly transmitting documents and information on to Strachan, Haldeman's assistant. Tr. 4511-4513, 4518, 6612-6613. Haldeman himself had learned directly about an early version of the Liddy plan when Dean reported to him shortly after the February meeting. Tr. 2635-2636.

B. *The Early Stages of the Conspiracy*

The five burglars arrested inside the DNC gave aliases to the D.C. police, but within hours of the break-in Liddy, who had been monitoring the operation from a safe vantage point in a nearby building, reported the capture to CRP's highest officials, then in California. He told them that one of the captured burglars was James McCord, on CRP's payroll as chief of security. In an apparent effort to avoid the apperance of any link between CRP and the burglars, Mitchell, Mardian, LaRue, and Magruder met and decided to contact the new Attorney General, Richard Kleindienst, urging him to have McCord released from jail before the police penetrated his alias. Mardian placed the call, but ultimately sent Liddy to find the Attorney General when Kleindienst could not be reached directly. Tr. 4530-4536, 6563-6565. This fitful effort foundered, however, on Kleindienst's insistence that the burglars receive no special treatment. If Mitchell wanted to talk to him about it, Kleindienst said, Mitchell should contact him directly. Tr. 5898-5909.

[13] LaRue, like Dean and Magruder, became an important Government witness. He too entered a plea of guilty to conspiracy and was awaiting sentencing at the time of this trial. Tr. 6733-6734, 6743-6746.

Aware that McCord's true identity would come to light. Mardian, Magruder, and LaRue the next day worked on a press release that would deny any CRP tie to the break-in. Tr. 4537-4540, 6565-6569. It suggested instead that McCord might have been working for clients of his private security firm. Haldeman, contacted by long-distance telephone, approved the statement and urged that the release issue as soon as possible, even though Magruder had already informed him that the break-in was "Liddy's operation." Tr. 4542-4544. The release appeared on June 18 under Mitchell's name and with his approval. J.A. 912.

Meanwhile, in Washington, White House and CRP files were being cleansed of sensitive materials relating to Gemstone. Strachan performed this function at the White House, under orders from Haldeman to remove anything embarrassing. Among the items destroyed were DNC wiretap reports and a memorandum from Haldeman to Magruder urging that the intelligence operation shift from Senator Muskie to Senator McGovern, the emerging Democratic front-runner. Tr. 2651-2653, 4547-4548. Magruder immediately ordered removal of all Gemstone materials from the files at CRP; he took them to his home upon his return from California on June 19. At a meeting that night, attended by Mitchell, Magruder, LaRue, Dean, and possibly Mardian,[14] Magruder asked Mitchell what to do with the papers. Mitchell suggested that he "have a fire," and he did—destroying the Gemstone documents in his home fireplace. Tr. 4540-4550, 4823, 6570-6573.

Dean met with Liddy on June 19 and received a full briefing on the background of the break-in. He then

[14] Mardian did attend the meeting, but he left early. Most witnesses could not recall whether he was present when the Gemstone documents were discussed. Tr. 2673, 5215, 6572-6573.

imparted his own substantial knowledge to Ehrlichman, detailing the roles of Hunt and Liddy and mentioning the pledge he had received from Liddy that Liddy would keep silent. Tr. 2648-2656. There was no similar assurance regarding Hunt; Ehrlichman consequently issued, then retracted, an order that Hunt leave the country. Tr. 2657-2660, 4192-4193. He also directed that Hunt's safe, in his office in the Executive Office Building, be opened. Tr. 2660-2661. Dean retrieved the materials from the safe (which included some electronic equipment related to Watergate along with documents related to other questionable activities), whereupon Ehrlichman suggested to Dean that he shred some and "deep six" the rest. Dean refused, fearing that too many people—White House employees and Secret Service agents—knew he had removed materials from the safe. Tr. 2679-2687. Ultimately the items were turned over to the FBI, although the most sensitive went directly to L. Patrick Gray, the Acting Director, with directions from Dean and Ehrlichman that they should never see the light of day. Gray complied. Tr. 6212-6217.

It was becoming increasingly clear that the grand jury investigation would eventually tie Liddy and Hunt to the break-in scheme, primarily by tracing the currency that had been found on the burglars.[15] Tr. 2696-2708,

[15] The conspirators were able to stall the FBI's tracing of the money for about two weeks by invoking the danger of trespassing on secret CIA projects. The FBI had already traced the funds to two individuals who apparently served as CRP intermediaries in the "laundering" of certain contributions from former Democratic Party supporters. Tr. 2696-2710, 6170-6175. One of the intermediaries was a Mexican citizen. The Bureau was ready to interview these individuals. but was deterred when General Walters, Deputy Director of the CIA, told Gray on June 23 that such interviews might uncover CIA operations in Mexico. Walters was acting on direct orders from Haldeman, delivered during a meeting participated in by Ehrlichman. (CIA Director Helms had also been at the meeting, insisting all along that there was no danger to CIA operations. Both Haldeman and Ehrlichman, moreover, knew at the time that the break-in was Liddy's operation.) Tr. 6123-6130, 6202-6204. Haldeman, in turn, had acted only after receiving approval for this course from President Nixon in a key meeting earlier that same day, June 23. He had told Nixon that both Dean and Mitchell suggested use of the CIA to contain the FBI investigation. Nixon agreed. Govt. Ex. 1 (a tape recording of the actual Nixon-Haldeman conversation), Tape Tr. 2-7. It was the public disclosure of this tape which led to the resignation of President Nixon.

6605-6608. This presented added problems, as the links to CRP and the White House became more apparent. The conspirators decided to cover higher involvement by plac-

By July 5 Gray had grown increasingly uneasy. He told Walters that the interviews would proceed unless the CIA directed otherwise, in writing. Walters delivered instead a memorandum stating that the CIA had no interest in the matter. The intermediaries were then finally interviewed. Tr. 6142-6144, 6207-6210.

This delay was made possible because some of the conspirators were carefully monitoring the FBI investigation. Beginning on June 21, at Ehrlichman's direction, Dean established a liaison with the FBI. Tr. 2690-2697. He sat in on several FBI interviews, received copies of reports and "lead sheets," and finally obtained a memorandum summarizing the investigation and future FBI plans. This memorandum he showed to Mitchell, Haldeman, and Ehrlichman. Tr. 2690-2697, 2711-2712, 2727-2728, 2830-2837, 6168-6176, 6217-6221, 6661.

Throughout this opinion "Govt. Ex." refers to a Government exhibit at trial. Most of the exhibits referred to here were tape recordings of the conversations of co-conspirators. "Tape Tr." refers to the transcript of tapes included as an appendix on appeal. These transcripts were carefully checked by the trial judge and, once he ruled they were "substantially accurate," they were then given to the jury to serve as listening aids while the jury heard the tapes through headphones. The transcripts themselves were not admitted into evidence, and the jury was repeatedly told that their own interpretation of what they heard on the tapes was to control. Tr. 2850-2855, 6152-6153.

ing all blame on Liddy, who had pledged silence. They would maintain that Liddy was off on a frolic of his own, betraying his position of trust within CRP. Tr. 2762-2763. It still was necessary to explain why this man, general counsel to the Committee, had been supplied with such large sums of money (it proved later to be $199,000) capable of diversion to private frolics. Tr. 2759-2773, 4552-4562, 6652-6660.

Hunt presented an additional problem. He, like Liddy, apparently knew that Gemstone was a project approved at the highest levels of CRP. Like Liddy he had participated earlier in several "seamy things" for the White House, as he once described them. Tr. 3088. For example, as members of the White House Special Investigation Unit,[16] and with the approval of Ehrlichman, who was head of the Unit, they had broken into the office of Daniel Ellsberg's psychiatrist, ransacking the doctor's records.[17] Tr. 7654-7656, 7664-7675. Significantly unlike Liddy, however, Hunt had never pledged to keep his knowledge of these things to himself. Assuring his silence would be extremely costly; he began to demand large cash payments on behalf of himself and the five burglars.

Thus were born the two major parts of the conspiracy: the cover story to explain the frolicsome Liddy's ability to draw so deeply on the CRP treasury, and the payment

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[16] This Unit was nicknamed the "Plumbers" since its mission was to stop leaks of classified information. Tr. 7656.

[17] *See United States* v. *Ehrlichman*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1882, decided May 17, 1976); *United States* v. *Barker*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1883, decided May 17, 1976); *United States* v. *Liddy*, —— U.S.App.D.C. ——, —— F.2d —— (No. 74-1885, decided May 17, 1976). Ellsberg, at one time a Defense Department official, had been responsible for transmitting the classified Pentagon Papers to the New York Times.

of hush money to those indicted and later convicted for the burglary.

C. *The Cover Story*

Magruder first suggested that CRP officials simply say that the $199,000 had gone to Liddy for security at the Republican nominating convention. He broached this story to a meeting attended by Mitchell, Mardian, LaRue, and Dean. Mardian expressed doubts that it would hold up—the sums seemed too large. Tr. 2759-2763. Thereafter Magruder tried again. He came to a subsequent meeting of the same group with the story that $100,000 was delivered to Liddy for protection of "surrogate speakers" [18] as they traveled around the country in behalf of the Nixon campaign. Only the remainder was meant for convention security. This story met with approval. Tr. 2769-2773, 4552-4562, 5254-5255, 6652-6660. It seemed sufficiently convincing, particularly when Magruder indicated that, at Magruder's urging, the CRP official in charge of the surrogate program would corroborate the story with perjured testimony of his own. Tr. 2769-2770, 4562-4563, 4570, 4697.

Magruder refined the story, reviewed it with Mitchell (who urged him to minimize Mitchell's role in running the campaign), and then rehearsed it with Dean, all in preparation for his appearance before the grand jury on August 16. His delivery of it on that date proved sufficiently persuasive that he escaped indictment—"by the skin of his teeth," according to Dean's intelligence from the investigation. Tr. 2773-2776, 4605-4612. Magruder was recalled before the grand jury in September to explain the January and February meetings that were entered in his calendar, the meetings where Gemstone

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[18] These were high Government officials who bore the major burden of campaign speaking duties, in place of Mr. Nixon. Tr. 2770, 4561.

was first discussed. With the assistance of Mitchell and Dean, however, he had prepared a subsidiary cover story to hide the purposes of these meetings. The first, he told the grand jury, had been cancelled, and the second related solely to the new election law. Tr. 2824-2829, 4612-4616.

Mitchell and Ehrlichman, meantime, were being careful to say nothing that might ruffle the veil the cover story had cast over Gemstone activities. Each denied to FBI agents that he knew anything about the break-in except what he read in the newspapers. Tr. 2820-2824, 5393-5402. Then on September 14 Mitchell told the grand jury that he was not aware of any clandestine CRP intelligence program, nor did he know of Liddy's illegal activities. Tr. 7094-7095. This testimony formed the basis for Mitchell's false declarations conviction under Count 4 of the indictment. 18 U.S.C. § 1623 (1970).

D. *Hush Money*

On June 20 or 21 Liddy met with Mardian and LaRue. He told them the full story concerning the background of the break-in, confessed his own role in the planning and execution, and explained that all those arrested would remain silent. He went on to say, however, that certain "commitments" had been made to provide them with bail, legal fees, and living expenses. LaRue assured him that all commitments would be met. Tr. 6601-6603. Later LaRue and Mardian met with Mitchell, Dean, and Magruder to tell them of Liddy's revelations and to decide how to raise the funds. Mardian suggested that the CIA might be a source (the burglars had prior CIA connections), and Dean was dispatched, after checking with Ehrlichman, to bring the CIA in. Tr. 2728-2735, 6610. He was unsuccesful. At Ehrlichman's insistent urging he tried again, but again was turned down. Tr. 2735-2737, 6132-6142.

With the approval of Haldeman and Ehrlichman, Dean on June 28 turned to another source. He contacted Herbert Kalmbach, a long-time Nixon fund-raiser. Tr. 2740-2742. He told Kalmbach that funds were needed to meet certain CRP commitments to the burglars, and that absolute secrecy was essential. Kalmbach agreed to take on the task. Tr. 2743-2745, 6298-6308. He obtained money from LaRue (money which came from excess cash held at the CRP offices), from the chairman of the Finance Committee to Re-elect the President, CRP's finance arm, and from a private contributor. Tr. 6309-6312, 6326-6345. Before he approached the private contributor, however, he checked with Ehrlichman to be sure that Dean had authority to put this fund-raising in motion. Ehrlichman quieted his doubts and took the occasion to stress the need for confidentiality. If the operation did not remain secret, he warned, "they would have our heads in their laps." [19] Tr. 6328-6332.

To distribute the money Kalmbach employed a courier who devised a complex scheme of leaving the funds in pay telephone booths and airport lockers. He was responsible for delivering $187,000 to the burglars through Hunt's lawyer, Hunt's wife, Hunt himself, and Liddy. All this took place between July 1 and mid-September, when Kalmbach made his final accounting and insisted he did not want to continue. Tr. 4213-4216, 6315-6348, 6350-6356, 6477-6511. Dean and LaRue kept Haldeman, Ehrlichman, and Mitchell posted throughout on the "money problem." Tr. 2751-2754, 6620-6628, 6683-6684.

On September 15 the grand jury handed up indictments against the five burglars, plus Hunt and Liddy. No one else was implicated. Tr. 4221-4222. The initial policy of "containment," as Dean was later to call it, had proven successful. Tr. 2855-2860, 3100.

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[19] Tr. 6331.

The need to channel hush money continued nonetheless. LaRue inherited Kalmbach's role. He delivered $20,000 or $25,000 to Hunt's lawyer immediately, and for a while the demands abated. Tr. 2872, 2907-2908, 6662, 6684-6685. But on November 13, only a few days after Nixon's re-election, Hunt called Colson at his White House office. With a tone of urgency he maintained that the commitments had not been met, and he reminded Colson that loyalty "is a two-way street." Colson taped the full conversation. Tr. 4250-4254, Govt. Ex. 35 B, Tape Tr. 642-658. Dean made a copy of the tape and took it to Camp David, Maryland, the presidential retreat, to play it for Haldeman and Ehrlichman. They agreed that the money was Mitchell's responsibility and dispatched the Hunt tape to New York in the possession of Dean—Dean to play the tape for Mitchell and impress upon him his responsibility. Tr. 2909-2931.

Mitchell did not shoulder it alone. Instead he promptly inquired, through Dean, about the availability of a secret $350,000 fund under Haldeman's control, transferred to the White House from excess CRP funds. Haldeman approved use of part of it to meet the burglars' demands. Tr. 2935-2941, 6687-6692, 6705-6708. Those involved initially expected that the fund would be replenished through LaRue's fund-raising, but that hope soon vanished. It ultimately became necessary to transfer the entire fund to LaRue (all with Haldeman's approval), and by February he had dispensed $167,000. Tr. 3033-3042, 6716-6724, Govt. Ex. 15, Tape Tr. 244-246.

Money was not enough to assure silence. Hunt had decided to plead guilty and wanted a guarantee that his sentence would be short. Colson, his erstwhile friend at the White House, checked with the President and then provided some veiled assurances which Hunt took to mean he would be granted clemency at Christmas 1973. Tr. 2987-2992, 4261-4270. Hunt and four of the burglars

did plead guilty. Liddy and McCord insisted on going to trial, although neither took the stand. They were found guilty, and sentencing was set for March 23, 1973. Tr. 4271. When McCord began to get restless as that date approached (he threatened in a letter to the White House that "all the trees in the forest will tumble" [20]), Mitchell urged that the same veiled assurances of clemency be extended to him. Ehrlichman agreed, and assurances were delivered to McCord—to no avail, it later developed. Tr. 2992-3001, 6518-6520.

E. *The Cover-up Unravels*

The greatest apparent threat to the conspirators' plans lay in the impending hearings of the Senate Select Committee on Presidential Campaign Activities, chaired by Senator Ervin. Dean, Haldeman, and Ehrlichman met at Rancho LaCosta in California in mid-February to plot strategy. They worried most about what the break-in defendants might say before the Committee if granted immunity. Knowing that more demands for money had been made, they decided it was essential that Mitchell meet what they all agreed was *his* responsibility—the providing of funds. A presidential assistant was sent to New York to tell Mitchell the results of the meeting and, once again, to remind him of his responsibility. Tr. 3032-3034.

Hunt demanded another $122,000 on March 16, in order to settle his financial affairs before sentencing. Dean relayed this word to Ehrlichman and, at his suggestion, on to Mitchell. Tr. 3086-3090. But Dean decided he had to speak with the President directly about the dangers inherent in guaranteeing the continued flow of money. On March 21, 1973 Dean thus told Nixon that there was a "cancer" growing on the presidency in the form of the endless hush money demands. He recounted all

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[20] Tr. 2995.

that he knew about the origin of the break-in and the subsequent payment of hush money. He guessed that future demands would come to another million dollars. Nixon replied that "you could get a million dollars. And you could get it in cash. I, I know where it could be gotten." [21] Nixon returned to the Hunt demand several times during the ensuing conversation, and he continued to mention it after Haldeman joined the discussion. Each

[21] Govt. Ex. 12, Tape Tr. 131. This conversation figured in Haldeman's conviction of perjury under Count 8 of the indictment. Haldeman testified before the Senate Select Committee that he had listened to a tape of the Nixon-Dean conversation, that Nixon had in substance made the remark quoted in text, but that Nixon then said "but it would be wrong." The tape of the conversation revealed, however, that many minutes passed and the topic had shifted before Nixon uttered any words to that effect:

PRESIDENT: One problem; you've got a problem here. You have the problem of Hunt and uh, his, uh, his clemency.

DEAN: That's right. And you're going to have the clemency problem for the others. They all would expect to be out and that may put you in a position that's just . . .

PRESIDENT: Right.

DEAN: untenable at some point. You know, the Watergate Hearings just over, Hunt now demanding clemency or he is going to blow. And politically it'd be impossible for, you know, you to do it. You know, after everybody . . .

PRESIDENT: That's right.

DEAN: I am not sure that you will ever be able to deliver on the clemency. It may be just too hot.

PRESIDENT: You can't do it till after the '74 elections, that's for sure. But even then . . .

DEAN: (Clears throat)

PRESIDENT: your point is that even then you couldn't do it.

DEAN: That's right. It may further involve you in a way you shouldn't be involved in this.

PRESIDENT: No it's wrong, that's for sure.

Govt. Ex. 12, Tape Tr. 156.

time he stressed, in the presence of Haldeman and Dean, that Hunt's immediate demands should be "handled" in order to "buy time." Neither Dean nor Haldeman demurred. Tr. 3094-3102, Govt. Ex. 12, Tape Tr. 103, 131, 135-137, 155, 159, 164-167, 189, 196, 205-206.

Haldeman, Ehrlichman, and Dean met later that day to discuss possible strategies. They agreed that Mitchell should step forward and take the full blame, thinking the prosecutors and the Senate Committee would thereby be pacified and would press no further. Tr. 3140-3141.

Mitchell, meanwhile, was meeting his "responsibility." Informed of the Hunt demand by LaRue, he directed LaRue to deliver $75,000 to Hunt's attorney that night. After this delivery Hunt, according to his own testimony at trial, repeatedly perjured himself before the grand jury. Tr. 4276-4290, 6726-6732.

The next day, March 22, Mitchell came to Washington and told the others that the Hunt problem was under control. Tr. 3208-3213, 8589-8590, 10280. Nixon, Dean, Mitchell, Haldeman, and Ehrlichman then took up a discussion that had begun the day before: the best strategy for dealing with the upcoming Senate hearings. Despite the previous day's plans, no one had the fortitude to suggest directly to Mitchell that he take the full blame and go to jail to save the Nixon presidency. Lacking that alternative, they all focused on a plan Nixon had discussed with Dean on March 17—indeed, it had been mentioned as an option for several months. Dean would make a report to the President. It would be quite general and would indicate that no one from the White House was involved. They might deliver it to the Senate Committee, but in any event it would serve as a safeguard for Nixon. Ehrlichman explained that if "some corner of this thing comes unstuck," the President could say he relied on the report.[22] Tr. 3213-3221, Govt. Ex. 16, Tape Tr. 273-287.

[22] Govt. Ex. 16, Tape Tr. 277.

The Dean report was never written, for on March 23 the conspiracy was dealt a heavy blow. McCord, facing sentencing, had written a letter to Judge Sirica breaking the word that the burglar's silence was the result of pressure, that others were involved, and that perjury had been committed. The letter was released to the public at the sentencing hearing that day. Tr. 3253-3254, 3259-3262. Shortly thereafter Magruder, Dean, and LaRue began to talk to the prosecutors. Tr. 3277-3280, 4639-4643, 6732-6733.

Throughout the month of April 1973 Haldeman, Ehrlichman, and Nixon met frequently at the White House trying to decide how to respond to the new developments.[23] They were faced with two primary problems: how to cope with Dean, who plainly knew a great deal, and how to explain the hush money payments—which, they recognized, were now bound to be revealed to the prosecutors and the public. As to the first, after much discussion Nixon asked Ehrlichman to try to bring Dean back on board through veiled assurances of clemency. Govt. Ex. 18, 22, Tape Tr. 389-393, 403-407, 469-476. Dean refused to speak with Ehrlichman, however, and his refusal rekindled the remaining conspirators' interest in a "scenario" laying the blame for all illegality on Dean. Tr. 3306-3307, Govt. Ex. 24, Tape Tr. 500-504. Haldeman, after spending a few hours reviewing the possibilities, reported that this scenario "works out pretty well."[24] It would key on Dean's failure to present the President with the Dean report in late March. Only then, the scenario went, were the President's suspicions fully aroused, and only then did he discover the scope of Dean's involvement. Govt. Ex. 26, Tape Tr. 557-567.

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[23] Admitted into evidence were tapes of 14 conversations during this period involving Nixon and either Ehrlichman or Haldeman or both. Govt. Ex. 18-24, 26-29, 31-33.

[24] Govt. Ex. 26, Tape Tr. 557.

This scenario also dealt tentatively with the second problem—explaining the hush money. They would state that the money was delivered for humanitarian purposes[25]—legal fees and family support—and that their sole motivation was to discourage the defendants from talking to the press; they did not seek to keep them from being candid with the prosecutors. But both Haldeman and Ehrlichman wanted to consult their lawyers before relying too heavily on that version of the story. Govt. Ex. 27, 28, Tape Tr. 570, 573-574.

When Haldeman was called before the Senate Select Committee in late July and early August 1973, he carried out the scenario laying all blame on Dean. He told the Committee that no one at the White House, except Dean, knew that the payments to the burglars were for "hush money" before March of 1973. He said Nixon discussed with Dean on March 21 the possible payment of a million dollars to the burglars, but he insisted that Nixon had followed that up by saying "it would be wrong."[26] And he claimed that there had been no discussion of Magruder's perjury at the March 21 meeting. Tr. 7483-7489, 7518-7519, Govt. Ex. 100. These statements formed the basis for Counts 7, 8, and 9 of the indictment charging Haldeman with perjury. 18 U.S.C. § 1621 (1970). He was convicted on all three counts.

In early May Ehrlichman told the grand jury that he had no recollection of Dean's having told him of Liddy's involvement in the break-in during the first weeks after the burglary. He also testified that he had spoken gen-

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[25] As Nixon expressed it to Ehrlichman on April 14, all those involved have "gotta have a straight damn line that, of course we raised money. Be very honest about it. But, uh, we raised money for a purpose that we thought was perfectly proper." Ehrlichman agreed. Govt. Ex. 22, Tape Tr. 471-472. *See* Govt. Ex. 37, Tape Tr. 664-665.

[26] *See* note 21 *supra*.

erally with Kalmbach about Kalmbach's fund-raising efforts, but he denied all recollection of any mention of the purposes the money was to serve, and he claimed no memory of telling Kalmbach to keep the efforts secret. Tr. 7180-7192. For this testimony he was charged in Counts 11 and 12 with making false material declarations, 18 U.S.C. § 1623 (1970), and the jury found him guilty of both offenses.

Mitchell too, although he had not been privy to most of the April meetings where scenarios were devised, advanced the cover-up through his testimony before the grand jury and the Senate Committee in the spring and summer of 1973. On April 20 he denied before the grand jury any recollection of having been told of Liddy's confession to LaRue and Mardian. Tr. 7158, 7166-7167. Before the Senate Committee in July he claimed not to have heard of Gemstone as of June 19, 1972, and he denied that there was any mention of destroying documents at the meeting he held that evening with Magruder, Mardian, Dean, and LaRue. Tr. 7177-7180. These statements founded Counts 5 and 6 of the indictment, charging false declarations, 18 U.S.C. § 1623 (1970), and perjury, *id.* § 1621, respectively. Mitchell was convicted under each.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant,*

v.

ADMINISTRATOR OF GENERAL SERVICES,
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, *et al.,*
JACK ANDERSON,
LILLIAN HELLMAN, *et al., Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN HISTORICAL ASSOCIATION, AMERICAN POLITICAL SCIENCE ASSOCIATION, ET AL.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON, *Appellant,*

v.

ADMINISTRATOR OF GENERAL SERVICES, *et al., Appellees.*

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEES THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.[1]

OPINION BELOW

The opinion of the three-judge court is reported at 408 F. Supp. 321 and is reprinted in the Appendix to the Jurisdictional Statement (J.S. 1a-106a).

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[1] The Reporters Committee for Freedom of the Press is an organization devoted to promoting the First Amendment and freedom of information interests of the working press in all media. The American Historical Association is composed of approximately 18,000 scholars engaged in the study, teaching and writing of history. The American Political Science Association, which has approximately 17,000 members, is the principal professional or-

QUESTIONS PRESENTED

The central question presented in this case is whether the records of the government's highest executive office over five and one-half crucial years of the nation's history may be preserved and regulated by government officials in accordance with publicly established rules and procedures, or whether those records must, despite the remedial efforts of Congress and the incumbent President, be turned over to an ex-President—a private person with no public accountability—whose sole discretion would control their preservation, suppression or destruction. More particularly, the questions presented are:

1. Whether the doctrine of "separation of powers" prohibits Congress and the executive branch from jointly establishing a program for the preservation, in the executive branch, of the records of a presidential administration.

2. Whether the doctrine of "presidential privilege" subordinates the continuing needs of succeeding administrations, the Congress and the courts for the records of an administration to the interest of a former

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ganization in the United States devoted to research and education on politics and government.

In addition to the organizations described above, the appellees represented in this brief include James MacGregor Burns (Professor of Political Science at Williams College); Nat Hentoff (author and columnist); Donald Herzberg (Professor of Government and Dean of the Graduate School of Georgetown University); William Leuchtenberg (Professor of American History at Columbia University); Arthur Link (Professor of American History at Princeton University); J. Anthony Lukas (author and reporter); Austin Ranney (Professor of Political Science at the University of Wisconsin); and Clement Vose (Professor of Government at Wesleyan University).

President in treating them as his own personal property.

3. Whether White House records generated in the transaction of public affairs are government property, subject to custody and disposition in accordance with public law, rather than the private property of an ex-President.

4. Whether preservation of the records of the Nixon administration pursuant to the Presidential Recordings and Materials Preservation Act constitutes a bill of attainder.

5. Whether the fact that Mr. Nixon intermingled some of his personal papers with a vastly greater quantity of government records concerning the performance of his official duties entitles Mr. Nixon to exclusive personal control over all such public records, notwithstanding the fact that the Presidential Recordings and Materials Preservation Act guarantees that personal materials will be returned to Mr. Nixon as promptly as possible and in complete confidence.

STATEMENT

A. The Materials at Issue

The materials covered by the Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, 88 Stat. 1695, 44 U.S.C. § 2107 note (Supp. I) (hereinafter "the Act") constitute the records of the highest offices of the executive branch of the government of the United States from January 20, 1969 to August 9, 1974. They consist of documents prepared by government employees, working on government time and utilizing government facilities, in the course of discharging their official governmental duties. They relate

to the entire range of the foreign and domestic issues considered by our government in recent years.

The record below establishes that the materials claimed by Mr. Nixon consist of some 42 million pages of documents and 880 reels of tape-recorded conversations.[2] Mr. Nixon has admitted that he never saw more than 200,000 of the documents at issue. Nixon Dep. Tr. at 15-16, App. 515-17.[3]

Many of the materials preserved by the Act are of critical importance to the ongoing conduct of the federal government—a government which is a continuing process that does not begin anew whenever an individual President departs office. The record below establishes that various records from Mr. Nixon's administration were needed, and in the future will be needed, by the Ford and Carter administrations, by Congress,

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[2] Mr. Nixon asserts, without citing any evidence, that the estimate of 42 million pages may be "inflated." App. Brief at 25. That figure, however, was the estimate of the GSA custodians of the documents. See *Hearings on GSA Regulations Implementing Presidential Recordings & Materials Preservation Act before the Senate Committee on Government Operations,* 94th Cong., 1st Sess. at 83 (1975).

Mr. Nixon further states that approximately 18.7 million of the documents consist of birthday greetings, correspondence, and extra copies of records filed elsewhere. App. Brief at 25-26. Assuming that this is true, Mr. Nixon is still claiming personal ownership of more than 20 million pages of records relating to government business which are *not* extra copies and are *not* birthday greetings and the like. The fact that Mr. Nixon now contends that he may have seen as much as one percent of the documents at issue, rather than one-half of one percent as he originally testified, is hardly grounds for reversing the decision of the court below.

[3] References herein to the principal appendix will be cited as "App.—." References to the appendix to Mr. Nixon's Jurisdictional Statement will be cited as "J.S. App.—." References to Mr. Nixon's brief will be cited as "App. Brief —."

by the federal courts, and by the public as a whole. *See* J.S. App. 52a-61a, 408 F. Supp. at 350-55.

For example, during the course of this litigation the Justice Department disclosed that "the National Security Council has a group of files which they are constantly using, which are part of the White House papers . . . ."[4] The following NSC materials are among the documents which Mr. Nixon now claims as his own personal property:

> "—Memoranda to the President for his information, review, and decision, including proposed Presidential decisions and instructions.
>
> —Memoranda of conversations between the President and foreign heads of Government/State and other foreign dignitaries including, but not limited to Foreign Ministers and other Cabinet officers, Ambassadors and Special Emissaries.
>
> —Records of appointments and meetings with U.S. Cabinet officers and other officials pertaining to national security matters.
>
> —Intelligence reviews, reports and analyses pertaining to national security affairs.
>
> —Defense-related papers associated with deployment of forces, budget, research and development, and organization/command structure.
>
> —Telegrams originating in the White House dispatched to foreign governments, U.S. ambassadors, and force commanders relating to foreign policy and national security decisions.
>
> —Sensitive incoming cable traffic associated with negotiations, plans, evaluations, and the impact of decisions taken on national security." App. 334-35.

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[4] *Nixon* v. *Sampson,* Civ. No. 74-1518 (D.D.C.), Transcript of Hearing at 141 (Oct. 21, 1974).

As one would expect, these sensitive documents have already been needed by Mr. Nixon's successors. During this litigation, General Brent Scowcroft, Deputy to the Secretary of State in charge of the NSC, entered the vault containing some of the materials at issue in order to secure the correspondence between Mr. Nixon and former President Thieu of South Viet Nam. This review coincided with the national debate at the time of the fall of South Viet Nam as to whether Mr. Nixon had made secret commitments to use American troops to enforce the 1973 Paris accords. Without ready access to the Nixon-Thieu correspondence documenting the nature of these commitments, American interests could have been seriously jeopardized. *See* Affidavit of Jeanne W. Davis, Staff Secretary to the National Security Council ¶ 13, App. 260-61. Other NSC documents, which Mr. Nixon now claims as his own personal property, were similarly consulted by government officials during the course of this litigation in connection with critical decisions on our negotiating posture in the SALT talks, the Middle East peace proposals, and President Ford's meeting with leaders of the People's Republic of China. Davis Affidavit ¶¶ 10-14, App. 259-61.

The National Security Council files are not the only important government documents which Mr. Nixon here claims as his own personal property. The materials at issue include a vast array of other government documents prepared by or for members of the White House staff, including the files of a number of presidential commissions, committees and boards which operated during Mr. Nixon's five and one-half years in office. App. 332-36. In Mr. Nixon's own words, the materials include every document of any kind "pre-

pared and sent to members of the White House Staff from the Executive Agencies, or [from] a member of the White House Staff to a member of the White House Staff . . . ." Nixon Dep. Tr. at 86, App. 574. The materials at issue thus record the official actions of the President and all of his staff—those which relate to duties specified by the Constitution, to the President's supervision of cabinet offices and presidential appointees, and to his general administration of the executive branch of government. Nixon Dep. Tr. at 28-30, App. 525-27.

In addition to the continuing needs of the executive branch, many of the materials which Mr. Nixon now claims relate to matters of continuing congressional concern. For example, during the course of this litigation—and over Mr. Nixon's opposition—the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities obtained access to some of the documents at issue during its review of the nation's intelligence programs.[5]

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[5] When the Senate committee sought access to these materials, the Ford administration indicated that it intended to make them available. *See Government's Motion for an Order Permitting Search of the Presidential Materials of the Nixon Administration,* filed in *Nixon* v. *Sampson,* Civ. No. 74-1518 at 5-6 (D.D.C. August 25, 1975). Mr. Nixon opposed any such access until it became clear that litigation would ensue in which President Ford would not support his resistance. *See id.,* Exs. G and H (letters exchanged between counsel for President Ford and Mr. Nixon).

In contrast to the ultimate success of the Senate Select Committee, President Ford's own commission on CIA activities within the United States was unable to review some of the materials at issue in this case which were directly relevant to its mandate. Because of the commission's short life, it could not undertake litigation to overcome Mr. Nixon's opposition to access. *See Report to the President by the Commission on CIA Activities within the United States* at 172 n.1 (1975).

Other congressional committees have not been as successful. Shortly after the fall of South Viet Nam, Senator Abourezk, Chairman of the Senate Subcommittee on Separation of Powers, requested access to documents concerning secret United States-South Vietnamese agreements. Intervenor-Defendants' Evidentiary Submission in the court below, filed July 31, 1975, *Letter from James Abourezk to Philip W. Buchen,* (June 9, 1975). Mr. Nixon opposed this request on the ground that the review of the Vietnamese situation was not "current government business" under the temporary restraining order issued as a result of this litigation. Int.-Def. Ev. Sub., *Letter from Herbert J. Miller to Philip W. Buchen* (July 2, 1975). The record below catalogues a number of other congressional requests for documents which have similarly been opposed by Mr. Nixon after his departure from office.[6]

The materials at issue have also been needed, and are currently needed, in a wide range of judicial proceedings. Subpoenas for some of the materials have been served in a number of cases, but Mr. Nixon has consistently resisted production and has impeded the efforts of both the incumbent administration and the courts to arrive at a just determination of these mat-

[6] *See* Int.-Def. Ev. Sub., Letter from Representative John D. Dingell, Chairman of the House Select Committee on Small Business, to Philip W. Buchen (January 15, 1975) and the response thereto by Herbert J. Miller to Philip W. Buchen (January 30, 1975); Int.-Def. Ev. Sub., Letter from Laurence N. Woodworth, Chief of Staff of the Joint Committee on Internal Revenue Taxation, to Philip W. Buchen (March 13, 1975) and the response thereto from Herbert J. Miller to Philip W. Buchen (March 27, 1975). *See also* Affidavit of Raymond G. Larroca ¶ 6, App. 213-14.

ters. These proceedings have included the investigation and prosecution of Watergate matters. But they have also included other civil and criminal proceedings in various courts throughout the nation. *See* J.S. App. 60a-61a, 408 F. Supp. at 354.[7]

Finally, the record below establishes that the materials at issue include documents essential to an understanding by the American people of matters of continuing public concern—an understanding essential for the healthy operation of the republican form of government established by the Constitution. *See* J.S. App. 49a-52a, 58a-59a, 408 F. Supp. 349-50, 353.

The Nixon-Sampson agreement, which is discussed below, purported to give Mr. Nixon sole authority over all of the records of his years in office. It raised the spectre that those critically important documents would be permanently suppressed or destroyed. Congress and President Ford perceived that this situation posed a grave threat to the continuity of important federal government functions and to public confidence

[7] *See, e.g., United States* v. *National Broadcasting Co.,* 1974-2 Trade Cas. ¶ 75,396 (C.D. Cal. 1974); *Halperin* v. *Kissinger,* C.A. No. 73-1187 (D.D.C.); *Oliver* v. *Committee for the Re-Election of the President,* C.A. No. 1207-73 (D.D.C.); *Democratic National Committee* v. *McCord,* C.A. No. 1233-72 (D.D.C.); *Sun Oil Co.* v. *United States,* No. 806-71, (Ct. Cl.); *Dellums* v. *Powell,* C.A. No. 2271-71 (D.D.C.); *Apton* v. *Wilson,* C.A. No. 798-72 (D.D.C.); *Kuhn* v. *Wilson,* C.A. No 956-71 (D.D.C.); *Rothblatt* v. *Nixon,* C.A. No. 74-1080 (D.D.C.); *United States* v *Means,* Crim. No. 73-5035 (D. S.D.). App. 216-17.

Recently the Court of Appeals for the District of Columbia Circuit upheld one of these subpoenas and directed production of some of the materials at issue. *Dellums* v. *Powell,* No. 76-1336 (D.C. Cir., Jan. 28, 1977).

in the government itself. J.S. App. 58a-59a, 408 F. Supp. at 353.

B. Background of the Act

The Presidential Recordings and Materials Preservation Act is only the most recent legislation dealing with the preservation and disposition of the records of the executive branch of the federal government. The Federal Records Act of 1950, 44 U.S.C. §§ 2701-3314, and the Presidential Libraries Acts of 1950 and 1955, 44 U.S.C. §§ 2101 *et seq.*, established procedures to preserve government records and to acquire additional private materials pertaining to the Presidency. More recently, the Freedom of Information Act, 5 U.S.C. § 552, was promulgated to insure that the records of the executive branch would be open to public scrutiny under regulations protecting legitimate governmental and personal confidences.

In 1973, the Watergate hearings and the controversy over personal tax deductions for "donations" of government materials focused national attention on the records of public officials. It became increasingly clear that the existing statutes were not achieving proper government retention and control, and Congress began to consider various reforms.[8]

On August 9, 1974, Mr. Nixon resigned the Presidency. Within hours, White House archivists were summoned to an emergency meeting and, working virtually around the clock, began to collect, for immediate shipment to California, the records of Mr. Nixon's five and one-half years in office. The archivists were

[8] *See, e.g.* H.R. 12116, 93d Cong., 1st Sess. (1973); S. 2951, 93d Cong., 2nd Sess. (1974).

"under great pressure to get the materials collected as rapidly as possible."[9]

On September 8, 1974, the White House disclosed the terms of an agreement between Mr. Nixon and the Administrator of the General Services Administration, Arthur Sampson, relating to the records of Mr. Nixon's years in office. That agreement provided that

> —All materials compiled during Mr. Nixon's administration were to be transported immediately to California (App. 39);
>
> —Mr. Nixon was to "retain all legal and equitable title to the Materials" (App. 39);
>
> —Mr. Nixon was to have an absolute veto over access to the materials by any party, including officials of succeeding administrations (App. 39);
>
> —After three years, Mr. Nixon could, "without formality," "withdraw . . . any or all of the Materials," except the tapes, for "any purpose," including destruction (App. 40; 10 Weekly Compilation of Presidential Documents at 1117);
>
> —After five years, Mr. Nixon could order the destruction of any or all of the tapes, and all of the

[9] Testimony of John Nesbitt in *Nixon* v. *Sampson*, C.A. Nos. 74-1518, 74-1533 and 74-1551, Nov. 15, 1974, Transcript at 60-61 (stipulated by the parties as part of the record below).

Mr. Nixon asserts that staff members were instructed to retain copies of documents needed for ongoing matters. App. Brief at 5. But the hollowness of this "instruction" is demonstrated by the fact that the staff members in question were those of Mr. Nixon's outgoing administration and that, in a matter of days, thousands of boxes of internal files were hastily gathered for shipment to Mr. Nixon in California. Nesbitt Testimony, Nov. 15, 1974 at 60-61, 80-83. In any event, it cannot be lightly assumed that such outgoing staff members could accurately guess which documents would be needed by future administrations.

tapes would be destroyed by September 1, 1984, or upon Mr. Nixon's death, whichever occurred first (App. 41).[10]

Announcement of the Nixon-Sampson agreement resulted in an immediate expression of concern from the Special Prosecutor, Congress, and the public. Several lawsuits were filed;[11] legislation was introduced; and hearings were held. Those hearings established that:

—Past practices concerning the preservation and disposition of presidential materials had been haphazard and, as a result, many papers from former administrations had been lost or destroyed;

—A comprehensive investigation was needed to develop general legislation governing the disposition and preservation of documents acquired by executive officials;

—The Nixon-Sampson agreement necessitated immediate action to preserve the materials of Mr. Nixon's years in office for use by future administrations, Congress, the courts, and the American people as a whole.[12]

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[10] Mr. Nixon repeatedly asserts in his brief that the Act at issue was drafted in great haste. But congressional consideration of the Act was far more deliberate than the hasty manner in which the Nixon-Sampson agreement was executed. On September 5, 1974, Mr. Nixon's personal attorney presented a draft that would, with minor changes, become the final agreement. Two days later, Mr. Sampson was summoned to a meeting where he read the agreement for the first time and signed it, without modification, approximately an hour later. *See Nixon* v. *Sampson*, 389 F. Supp. 107, 116 (D.D.C. 1975); Deposition of Arthur Sampson in *Nixon* v. *Sampson, supra*, at I 12-13, 20-21.

[11] These lawsuits are described at pp. 18-22, *infra*.

[12] *Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902 and Related Legislation*, 93d Cong., 2d Sess. at 32, 43, 49, 57-61, 67-70, 81-85, 88-91, 92-94, 145-48 (1974). *See also* H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 8 (1974).

On October 4, 1974, the Senate considered and passed S. 4016, which ultimately became Title I of the Act. 120 Cong. Rec. 33975. The floor debates demonstrate that the Senate recognized

—That it had to act promptly to respond to the Nixon-Sampson agreement;

—That, with certain exceptions, it was important to provide public access to the materials at issue to restore public confidence in the governmental process and to prevent future abuses of public trust; and

—That existing legislation was inadequate to protect government records needed by both the executive and judicial branches from an unreliable custodian who had obtained the ostensible right to suppress and destroy any or all of those materials.[13]

Mr. Nixon asserts that it is "entirely clear from the legislative history" that the interest served by the

Mr. Nixon's assertion that the congressional hearings did not address the portion of the Act presently at issue (App. Brief at 128 n.58) is simply not true. The hearings are replete with testimony and submissions relating to the Nixon-Sampson agreement and the need to preserve the materials now at issue. *See Hearings . . . on H.R. 16902 and Related Legislation, supra*, at 26-31, 32, 39-42, 45-50, 54-56, 96-97, 102, 106, 118, 135-36, 148-50, 154-55.

In addition, the hearings reprinted Mr. Nixon's motion and brief in support of an injunction enforcing the Nixon-Sampson agreement and the answer in opposition thereto filed by The Reporters Committee, *et al. Id.* at 156-225. Congress was thus well aware of the factual and legal issues at stake.

[13] *See, e.g.*, 120 Cong. Rec. 31549-50 (Sept. 18, 1974) (Remarks of Sen. Nelson); 120 Cong. Rec. 33860-61 (Oct. 3, 1974) (Remarks of Sen. Javits); 120 Cong. Rec. 33873-74 (Oct. 3, 1974) (Remarks of Sen. Cranston); 120 Cong. Rec. 33874-75 (Oct. 3, 1974) (Remarks of Sen. Huddleston); 120 Cong. Rec. 33875-76 (Oct. 3, 1974) (Remarks of Sen. Ribicoff).

Act in the availability of documents for ongoing government business is nothing more than "an after-the-fact rationalization, not remotely contemplated by a single Senator or Representative who voted on the measure." App. Brief at 114-15. The House Report on the Act, however, made the continuing interests of all three branches of the federal government--and of the American people as well—perfectly clear:

> "By allowing Mr. Nixon to destroy all of the materials, the [Nixon-Sampson] agreement ignores the public interest in preserving them. *It ignores the legitimate continuing need for these materials in many judicial proceedings,* including some in which U.S. law enforcement will be frustrated and individual rights impaired if the materials are unavailable to the courts. *It ignores the needs of Congress and executive agencies for continued use of the documents in the process of government.* And it ignores the needs of historians, political scientists, and other scholars for the information these materials contain on the events of recent years and the workings of our government." H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 3 (1974) (emphasis added).[14]

Similarly, Mr. Nixon's contention that Congress had no basis for finding that he might be an unreliable custodian of the materials at issue can only be described as staggering. Only a few weeks before the Act was introduced, the House Judiciary Committee, following a painstaking investigation which has no

[14] *See also* Section 102(d) of the Act which provides for access to the materials by any agency or department of the executive branch.

parallel in congressional history, concluded that Mr. Nixon's edition of the tapes concerning Watergate had "proven to be untrustworthy." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. at 205 (1974). The Committee found that the transcripts personally prepared by Mr. Nixon contained "significant omissions, misattributions of statements, additions, paraphrases, and other signs of editorial intervention. . . ." *Id.* at 129.[15]

Based on this record, the House of Representatives—expressing the same concerns voiced by the Senate—passed S. 4016 on December 3, 1974. 120 Cong. Rec. 37906. On December 19, 1974, President Ford signed the Act into law. Mr. Nixon filed this lawsuit the following day.

C. Provisions of the Act

The Act directs the General Services Administration to collect and preserve the official documents and tape recordings made by government employees "which constitute the Presidential historical materials" of the Nixon administration. 44 U.S.C. § 2107, note (Supp. I), Section 101.[16] The Act gives Mr. Nixon

[15] Significantly, while Mr. Nixon now argues that he was entitled to a judicial determination on whether he have would been an unreliable custodian of the materials, he refused to answer any questions during his deposition about the discrepancies between his edited transcripts of some of the tape recordings in question and the transcripts prepared by the House Judiciary Committee. Counsel for Mr. Nixon made it clear that it was Mr. Nixon's position that he was entitled to control over all of the materials at issue regardless of whether he was responsible for altering the records of his administration. Nixon Dep. Tr. at 100-05, App. 585-90.

[16] The text of Title I of the Act is reprinted in Appendix I to Appellant's Brief.

and his designees full access to the materials "at all times" (Section 102(c)) and provides for like access by the Special Prosecutor (Section 102(b)) and other government agencies "for lawful Government use." (Section 102(d)).

The Act directs GSA to promulgate regulations which will make some of the materials available to the public. (Section 104). Pursuant to the Act, those regulations will meet the need to inform the public about "the abuses of governmental power . . . identified [as] . . 'Watergate'" (Section 104(a)(1)); the need to make the materials available for judicial proceedings (Section 104(a)(2)); the need to prevent general access to national security information (Section 104(a)(3)); the need to protect every individual's right to a fair trial (Section 104(a)(4)); the need to preserve "any legally or constitutionally based right or privilege which would prevent or otherwise limit access" (Section 104(a)(5)); the need to provide access to materials of historical significance (Section 104(a)(6)); and the need to give Mr. Nixon or his heirs "sole custody and use" of all personal materials (Section 104(a)(7)).

The Act further provides for judicial review of all of the regulations promulgated pursuant to the Act and of all decisions on the retention or publication of any of the materials. (Section 105(a)). The Act also provides that if any court concludes that preservation of the materials has deprived any person of private property, just compensation shall be paid to that person as determined by the court. (Section 105(c)).

Contrary to the repeated assertions in Mr. Nixon's brief, *the Act does not retain any of Mr. Nixon's personal papers for future publication or, indeed, for any other use.* The Act clearly provides that the government will retain and preserve only those materials prepared or received by public officials in the course of discharging their governmental duties. By its very terms, the Act applies only to "Presidential historical materials"—*i.e.*, those pertaining to the Presidency. (Section 101(b)(1)). Personal materials—such as notes from Mr. Nixon's daughters concerning their wedding plans—will not be retained regardless of their "historical" significance, because they do not concern Mr. Nixon's actions in office. Rather, the Act provides that all such materials will be returned to Mr. Nixon "for his sole custody and use." (Section 104(a)(7)).

The legislative history of the Act and the regulations which have thus far been proposed to implement it similarly leave no doubt that Mr. Nixon's personal papers will not be retained or publicized by the government. During the House debate, Representative Brademas, one of the co-authors of the Act, stated:

> "Materials of a purely personal nature, such as records from Mr. Nixon's private law practice or persons corresponding with his family, would be returned to him, pursuant to Section 105(a)(7) [now Section 104(a)(7)], to the extent they are found among the materials in the Government's possession." 120 Cong. Rec. 37903 (Dec. 3, 1974).

Consistent with this legislative intent, the regulations thus far proposed define the "private or personal materials" to be returned to Mr. Nixon to include all

> "papers and other documentary or commemorative materials in any physical form relating solely to a person's family or other nonpublic activities,

including private political association, and having no connection with his constitutional or statutory duties or political activities as President or as a member of the President's staff." Section 105-63.104(b) (April 13, 1976).

Thus, whether one looks to the Act, its legislative history, or the proposed implementing regulations, it is clear—as all of the appellees including the Government have consistently stated—that the Act does not apply to Mr. Nixon's personal papers. Mr. Nixon's insistence on mischaracterizing the reach of the Act, by arguing that it will retain and publicize his personal papers, can only be regarded as an effort to create constitutional impediments which in fact do not exist.

D. Proceedings in the Courts Below

In response to the concerns of the Special Prosecutor, Congress and the public at large, the Ford administration refrained from implementing the Nixon-Sampson agreement in the fall of 1974. On October 17, 1974 (approximately two months prior to final passage of the Act), Mr. Nixon sued Mr. Sampson and the federal government to compel compliance with the agreement. The Reporters Committee for Freedom of the Press, the American Historical Association, the American Political Science Association and other interested parties filed suit at approximately the same time to set aside the agreement and to prevent transfer of the materials to Mr. Nixon. These cases were consolidated with Mr. Nixon's action and were heard by the District Court for the District of Columbia.[17] On

[17] These cases were referred to in the courts below as the "consolidated cases."

January 31, 1975, the district court ruled that the vast preponderance of the materials now in issue were owned by the government and that the Nixon-Sampson agreement was therefore invalid. The court also ruled that claims of executive privilege could be asserted only by the incumbent President and not by a former Chief Executive. *Nixon* v. *Sampson,* 389 F. Supp. 107 (D.D.C. 1975).

On December 20, 1975, Mr. Nixon filed the present action against the United States, challenging the constitutionality of the Act here at issue. Mr. Nixon requested that a three-judge court be convened and that proceedings in the consolidated cases be stayed to permit his challenge to the statute to be decided immediately.[18] The court of appeals agreed that the present action should take priority and therefore stayed the decision of the district court in *Nixon* v. *Sampson, supra. Nixon* v. *Richey,* 513 F.2d 430 (D.C. Cir. 1975).

The Reporters Committee for Freedom of the Press and other parties in the consolidated cases moved to intervene in the present case because of their interest in preservation of, and ultimate access to, the presidential materials, as established by the district court in *Nixon* v. *Sampson.* These parties also asked to intervene because they intended to present certain legal arguments supporting the Act beyond those being presented by the Government.

The Reporters Committee, *et al.* were permitted to intervene, and a three-judge court was convened. All

[18] Mr. Nixon contended that the Act was unconstitutional on its face and that its constitutionality could be decided immediately, without reference to the content of the regulations that would be promulgated thereafter.

parties made substantial evidentiary submissions, including depositions and exhibits that had been filed in the consolidated cases. After briefing and argument, the court rendered its decision on January 7, 1976.

The court first held that preservation of the materials at issue does not impinge on the powers or privileges of the Presidency. J.S. App. 31a-66a, 408 F. Supp. at 340-57. Recognizing that President Ford had signed the Presidential Materials Act into law and that his administration was actively defending it against Mr. Nixon's "separation of powers" and "presidential privilege" claims, the court found "much to commend" the position that the theoretical impairment of executive powers perceived by Mr. Nixon, but not recognized by the incumbent President, "could not be the basis for invalidating the Act." J.S. App. 37a, 408 F. Supp. at 343.

Nevertheless, the court carefully considered Mr. Nixon's "separation of powers" and "presidential privilege" arguments. It found that Mr. Nixon had never seen more than a fraction of one percent of the records he was claiming as his own personal property. J.S. App. 40a, 408 F. Supp. at 345. It further found that even with respect to this small percentage that might arguably be subject to presidential or executive privilege, a number of considerations erode the confidentiality of presidential communications after a President leaves office. J.S. App. 42a-45a, 408 F. Supp. at 346-47. The court concluded that the important governmental and public interests established by the record—including the ongoing needs of the executive, legislative and judicial branches for ready access to the materials of the Nixon administration—substantially outweighed Mr. Nixon's private interests in controlling

the materials as his own personal property. J.S. App. 48a-66a, 408 F. Supp. at 348-57.

The court then carefully considered and rejected each of Mr. Nixon's claims that review and classification of the materials by government archivists would violate his personal rights of privacy, free speech and political association. J.S. App. 67a-93a, 408 F. Supp. at 357-69. Recognizing that Mr. Nixon had intermingled some personal papers in the far greater quantity of government materials in a manner which made it "impossible to segregate [them] other than by reviewing all of them," J.S. App. 79a, 408 F. Supp. at 362, the court found that screening by professional archivists pursuant to the Act was not only "a reasonable response" to the problem created by Mr. Nixon but also "the least intrusive manner" of insuring the governmental and public interests "of overriding importance" while at the same time respecting Mr. Nixon's privacy. J.S. App. 87a-88a, 408 F. Supp. at 367.

Finally, the court below rejected Mr. Nixon's contentions that preservation of the materials at issue denied him equal protection of the laws and constituted a bill of attainder.[19] It found that it was entirely appropriate for the government to act promptly with respect to the records of Mr. Nixon's administration given the fact that Mr. Nixon was the only President since 1929 whose papers were not deposited as government property in a presidential library. J.S. App. 93a-94a, 408 F. Supp. at 370. The court further found that Congress was justified in concluding that the government, rather than Mr. Nixon, was the proper custo-

[19] Mr. Nixon has abandoned his equal protection claims in this Court but continues to press his bill of attainder theory.

dian for the materials. J.S. App. 96a, 408 F. Supp. at 371. The court concluded that, given the express provisions of the Act guaranteeing Mr. Nixon's privacy and property rights through controlled access and just compensation, to be regulated and determined by the courts, Mr. Nixon's characterization of the Act fell "far short of making out a meritorious bill of attainder claim." J.S. App. 98a, 408 F. Supp. at 372.

SUMMARY OF ARGUMENT AND INTRODUCTION

This case does not present a controversy between two branches of the government concerning the "separation of powers" or "executive privilege." Rather, it involves a dispute between a private citizen and two branches of government acting together. This Court has previously held, for sound reasons of law and public policy, that claims of executive privilege may be asserted only by incumbent officials who alone are responsible to the American people for their actions. Even assuming that Mr. Nixon has some vestigial standing to assert that joint action by Congress and the incumbent President will upset the constitutional balance of governmental powers, his assertions are clearly entitled to less weight than those of his successors in office. Presidents Ford and Carter, bearing the full responsibilities of public office, simply have not perceived the threat to the Presidency hypothesized by Mr. Nixon, who has obvious personal interests in controlling the materials.

In fact, the record establishes that preservation of the materials at issue will not inhibit future Presidents and their advisors from functioning in an effective manner. Presidential materials are traditionally preserved in government libraries and often disclosed by Presidents and their advisors after their term in office has been completed. There is no realistic expectation that such communications will forever remain secret. Indeed both the Ford and Carter administrations have defended the Act from Mr. Nixon's attack in part because preservation of the materials will *facilitate* the operation of the executive branch by insuring ready access to important government documents necessary for the conduct of domestic and foreign policy. Moreover, the fact that President Ford voluntarily complied with the substance of the Act when he left office belies Mr. Nixon's contention that the "precedent" established by the statute will impair the ability of future Presidents to maintain their independence.

The government's authority to preserve the materials of Mr. Nixon's years in office is not diminished by the practices of prior Presidents with respect to the papers of their administrations. Some former Presidents have acted in a manner inconsistent with the public and governmental interests, but the majority of our Presidents—and, more importantly, all recent Presidents except Mr. Nixon—have recognized that the records of their administrations should be preserved in trust for the American people. The Nixon-Sampson agreement constituted a radical departure from the practice of every other recent President in that it gave Mr. Nixon the right to withdraw, suppress or destroy any or all of the materials as he alone saw fit.

In any event, Congress and President Ford were not constitutionally bound to follow a dubious "tradi-

tion" of private ownership that long ago lost any justification. Rather, they were entirely justified in extending the evolving system of governmental regulation of executive branch records to the materials at issue.

In this respect, it must be emphasized that the vast preponderance of the materials at issue consist of government documents generated by government employees, on government time, using government facilities, in the course of discharging their official governmental duties. These materials are thus the property of the federal government and as such were already subject to existing legislation such as the Federal Records Act, 44 U.S.C. §§ 2701-3314, and the Freedom of Information Act, 5 U.S.C. § 552.

There is equally no merit in Mr. Nixon's characterization of the Act as a punitive bill of attainder. The Act was designed to preserve materials relating to governmental affairs and did not have either the purpose or effect of punishing Mr. Nixon. As the court below found, the record available to Congress amply established the need for prompt governmental action to insure the continued availability of the governmental materials at issue. The Act insured such availability while at the same time guaranteeing Mr. Nixon's privacy and property rights pursuant to full judicial review.

Nor is there any merit in Mr. Nixon's claims that preservation and classification of the materials at issue will violate his rights to privacy and political association. Mr. Nixon had no legitimate expectation of privacy in the vast majority of the materials, which were official government documents that he neither owned

nor possessed. No decision of this Court has ever suggested that an elected official can conceal his conduct of public office on the ground that it is a "private" matter. As for any genuinely personal documents that may be intermingled among the presidential materials, the Act makes it clear that all such documents will be returned to Mr. Nixon in complete confidence.

It must be emphasized that this appeal does not present any question of the retention or publication of any particular document or tape recording disputed by Mr. Nixon. Congress was well aware that national security and other important public interests, as well as personal privacy rights, might require that some of the materials at issue be withheld from disclosure, and the Act expressly provides that such materials will be restricted from public access. Moreover, the Act provides for full judicial review of any future decision to retain or publicize any particular document or recording. There will thus be ample opportunity for the courts to balance the conflicting interests that might be asserted with respect to specific materials.

The only question presently before this Court is whether the various rights Mr. Nixon now asserts are so pervasive and so absolute that they apply to each and every one of the 42 million pages of documents and each and every portion of the 880 reels of recordings in such a manner as to prohibit their preservation and classification by professional government archivists.

ARGUMENT

I. THE ACT DOES NOT VIOLATE THE "SEPARATION OF POWERS" DOCTRINE OR IMPINGE ON "PRESIDENTIAL" PRIVILEGE.

Mr. Nixon contends that preservation of the materials of his former administration encroaches impermissibly upon the Presidency in violation of the "separation of powers" doctrine and the principle of "executive" or "presidential" privilege. App. Brief at 52 *et seq.*[20] In the discussion that follows we will address ourselves first to the question whether Mr. Nixon is the proper party to assert that the Act will impair the independence of the present and future Presidents. We will then demonstrate that even if Mr. Nixon has standing to make such a claim, the court below was correct in concluding that the Act at issue will not destroy the Presidency as Mr. Nixon predicts.

A. Only an Incumbent President Can Assert the Privileges of the Presidency.

In support of his separation of powers and presidential privilege claims, Mr. Nixon cites various cases in which an *incumbent* President refused to comply

[20] Although Mr. Nixon's brief suggests that "separation of powers" and "executive privilege" are separate and distinct concepts (App. Brief at 67-68), the principle of executive privilege is merely an application of the separation of powers doctrine to demands by other branches for information in the possession of the Executive. Or, as Mr. Nixon put it in his brief to this Court in *United States* v. *Nixon,* 418 U.S. 683 (1974), "executive privilege [is] generally recognized as a derivative of the separation of powers doctrine." Brief for Respondent at 17. Therefore, in this section of this brief we address ourselves jointly to both formulations of Mr. Nixon's "presidential" argument.

with an act or request of Congress or the courts. Those precedents are clearly inapposite to the situation presented here. Mr. Nixon is no longer the President of the United States; he was not the President when the statute he attacks was enacted by Congress and signed into law by his successor; and his claims of presidential privilege and prerogative have been opposed by both the Ford and Carter administrations. Thus, this appeal simply does not present any conflict between an incumbent President and another branch of government. The conflict here is solely between Mr. Nixon —a private citizen with no governmental authority— and Congress joined by two successive Presidents.

Under the rule announced by this Court in *United States* v. *Reynolds,* 345 U.S. 1 (1953), the fact that Presidents Ford and Carter, and their respective administrations, have not only refused to endorse Mr. Nixon's claims of "presidential" or "executive" privilege, but have actively opposed them as well, precludes Mr. Nixon from advancing those claims as a private citizen. To hold otherwise would be to allow a former President who has returned to private life to make decisions with grave public consequences:

—He could impair his successors in office by withholding records essential to the continuity of government.

—He could frustrate the political process by preventing Congress and the American people from obtaining information about the past actions of the nation's highest office for use in determining future national policies.

—He could frustrate the courts from gaining access to records essential to the just settlement of disputes—including disputes about the legality of his own conduct while in office.

—He could disclose information that should be kept confidential.

He could make all of these decisions for his own private reasons—partisan politics or petulance, a desire for financial gain, an effort to alter the judgment of history, or a determination to shield himself from accountability for his conduct in office.

For these reasons, the Court was clearly correct when it held in *Reynolds* that the privilege Mr. Nixon seeks to invoke as a private citizen

> "belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." 345 U.S. at 7-8.[21]

Mr. Nixon argues that the "executive privilege" thus reserved to incumbents in *Reynolds* is founded on the need to protect "information" relating to "ongoing government operations," whereas the "presidential privilege" he seeks to assert as a private citizen is based on the need to protect "the confidentiality of internal operations of a Presidency."[22] App. Brief at

[21] This principle has been followed consistently by the lower courts. *See, e.g., Soucie* v. *David,* 448 F.2d 1067, 1071 & n.8 (D.C. Cir. 1971); *Mitchell* v. *Bass,* 252 F.2d 513, 516 (8th Cir. 1958); *Overby* v. *U.S. Fidelity & Guaranty Co.,* 224 F.2d 158, 162-63 (5th Cir. 1955); *Thill Securities Corp.* v. *New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wis. 1972); *Cooney* v. *Sun Shipbuilding & Drydock Co.,* 288 F. Supp. 708, 714 (E.D. Pa. 1968). *See also In Re Investigation of World Arrangements With Relation to . . . Petroleum,* 13 F.R.D. 280, 285-86 (D.D.C. 1952).

[22] This is a variation on the argument which Mr. Nixon advanced in the court below, where he contended that *Reynolds* ap-

85-86. But this distinction does not and cannot remove the records here in issue from the *Reynolds* requirement that governmental privileges be asserted by incumbent officials.

First, assuming *arguendo* that there are two different privileges, the fact is that the information which the two privileges protect is one and the same. For example, a confidential memorandum to Mr. Nixon from the Joint Chiefs of Staff is both "presidential," in the sense that it involved him, and "military" in that it contains "information" which can affect the integrity of ongoing defense policies and programs. A decision to disclose or not to disclose based on one of the privileges will necessarily affect the other. Thus, if records are placed in Mr. Nixon's custody to enable him to serve as guardian of his "presidential" privilege and to protect "the confidentiality of internal operations of a Presidency," his decisions will preempt those which the incumbent President might make as guardian of the "executive" privilege in protecting "information" relating to "ongoing government operations." Mr. Nixon, of course, never explains how the incumbent President could assert or waive governmental privilege with respect to "information" if all these records were under Mr. Nixon's exclusive control.

Second, Mr. Nixon argues that documents relating to foreign or defense policy are different from other

plied to "executive" privilege, which he sought to distinguish from "presidential" privilege. The semantic distinction advanced by Mr. Nixon has not been recognized by any court, and, in fact, has expressly been rejected by the court below and in two other recent decisions. J.S. App. at 36, n.24, 408 F. Supp. at 343, n.24; *Dellums* v. *Powell,* No. 76-1336, Slip. Op. at 6, n.8 (D.C. Cir., Jan. 28, 1977); *Sun Oil Co.* v. *United States,* 514 F.2d 1020, 1022-25 (Ct. Cl. 1975).

presidential materials because "the decision as to whether disclosure of particular information . . . would prejudice the Nation's interest at any particular time is one best made by the incumbent or his designee under law." App. Brief at 85. But this rationale is equally applicable to a host of domestic matters as well. The interests involved in the disclosure or nondisclosure of government records are preeminently public interests, whether the records relate to foreign or domestic affairs. There is no basis for entrusting those interests to a private person who would be subject to all the usual personal motivations and to no public constraints. In short, although *Reynolds* happened to involve military secrets, it is based on a rationale that is equally applicable to decisions on the disclosure of other executive branch information—that the public interest in the disclosure or nondisclosure of government records must be assessed by incumbent officials.

Only the *incumbent* President is in a position to determine whether the public interest justifies the assertion of "presidential" or "executive" privilege in a particular situation; he alone is publicly accountable for its misuse. As the Court of Appeals for the District of Columbia Circuit recently stated in rejecting Mr. Nixon's claims of a personal presidential privilege:

> "[I]t is the new [incumbent] President who has the information and attendant duty of executing the laws in the light of current facts and circumstances, and who has the primary, if not exclusive, responsibility of deciding when presidential privilege must be claimed, when in his opinion the need of maintaining confidentiality in communications, in which of course it is he who has the ongoing interest, outweighs whatever public interest or

> need may reside in disclosure. . . . Obviously, the privilege does not disappear merely because the president who made or received the communication dies, resigns, or has completed the term. The question is, by whom must be privilege be claimed. Analytically, there is much to be said for the proposition that . . . presidential privilege must be claimed by the president or an official authorized to speak for the president." *Dellums* v. *Powell*, No. 76-1336, Slip Op. at 10-11 (D.C. Cir., Jan. 28, 1977).

The intolerable consequences of Mr. Nixon's theory are highlighted by the fact that he claims that all presidential materials must be treated as his *personal property* in order to protect his personal presidential privilege. According to Mr. Nixon, were he to die tomorrow, the decisions as to what should be disclosed or withheld from disclosure in the public interest would descend to his wife, daughters or other designees.[23] And even while he is living, there is the danger that a former President would seek to achieve financial security or some other advantage by selling his "personal property" to the highest bidder. The dangers to the government that Mr. Nixon hypothesizes from continued governmental custody of presidential materials are surely less severe than the hazards of permitting private citizens who are not publicly accountable to have this sort of unfettered discretion to publish, suppress or destroy such important government records.

Not surprisingly, there is no judicial authority for the personal presidential privilege Mr. Nixon now

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[23] The Nixon-Sampson agreement in fact provided that, in the event of Mr. Nixon's death, control over all of the presidential materials in question would "inure to the benefit of the executor of my estate. . ." App. 38.

asserts.[24] To be sure, Mr. Nixon now argues that he is entitled to claim presidential privilege as a private citizen because it is a personal privilege analogous to those surrounding the physician-patient or attorney-client relationship. App. Brief at 87. But in his prior brief to this Court in *United States* v. *Nixon, supra,* Mr. Nixon recognized that presidential privilege

> "unlike the attorney-client privilege, the husband-wife privilege, and other personal evidentiary privileges, is a Constitutional privilege *which runs to the benefit of the public, rather than to the benefit of a particular individual.*" Brief for Respondent at 83 (emphasis added).[25]

We submit that Mr. Nixon was right the first time, and that this Court should adhere to *Reynolds* and hold that presidential privilege—which is designed for the benefit of the Presidency and ultimately the government as a whole—can only be exercised by the incumbent.[26]

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[24] Mr. Nixon's reliance on *United States* v. *Nixon, supra,* is misplaced, for that case involved an *incumbent* President who, at that time, had the responsibility for determining in the first instance whether the public interest required nondisclosure of certain information. Moreover, to the extent the principle of presidential privilege rests on the need to protect the President from harassing demands that might unduly impose on his time and divert him from his duties, the rationale becomes inapplicable when the materials of a former President are left in the custody of the new administration.

[25] *Accord*: *Kaiser Aluminum & Chemical Corp.* v. *United States,* 157 F. Supp. 939, 944 (Ct. Cl. 1958) (Reed, J.).

[26] The privilege extends, of course, to the records of a former administration. Mr. Nixon acknowledged at his disposition that an incumbent President is responsible for protecting the confidences of his predecessors. Nixon Dep. Tr. at 55-56, App. 548. And the court below held that the incumbent President would be fully entitled to assert presidential privilege over any of the materials at issue. J.S. App. 37a n.26, 408 F. Supp. at 343 n.26.

In any event, assuming *arguendo,* as did the court below, that a former President has some remaining right to assert presidential privilege (J.S. App. 40a, 408 F. Supp. at 344-45), such a claim is certainly entitled to less weight than those of the incumbent. In the present case, both President Ford and President Carter have opposed Mr. Nixon's claims. As we shall now discuss, their judgment that the presidential materials should be retained by the government must be weighed heavily in determining whether the Constitution requires that a former President be permitted to publish or suppress presidential materials as his own personal property.

B. The Act Will Not Impair the Powers of the Presidency

Recognizing that the post-resignation decision of the government to preserve the materials of his administration in no way inhibited his own exercise of presidential power, Mr. Nixon is forced to rest his "separation of powers" and "presidential privilege" arguments on speculation that preservation of the records of his administration has impaired, and in the future will continue to impair, the ability of his successors to discharge their constitutional duties. The record demonstrates that Mr. Nixon's speculation is unfounded for a number of reasons.

First, the record and findings of the court below establish that, far from impairing the Presidency, the Act will enhance that institution by promoting a more orderly transition between those who hold that important office. J.S. App. 52a-57a, 408 F. Supp. at 350-52. As the court below found, presidential materials from prior administrations have ongoing importance for the efficient operation of the executive branch. J.S.

App. 55a-56a, nn. 41, 42, 408 F. Supp. at 351-52, nn. 41, 42. The need for such access is demonstrated by some of the examples established in the record and considered by the court below:

—Upon the death of President Roosevelt, President Truman found that he had a continuing need for a substantial body of President Roosevelt's wartime papers. These "Map Room Papers" were retained by Mr. Truman and his staff for their continued use, in some cases as late as 1951. Affidavit of William R. Emerson (July 22, 1975), Exs. C1 to C12. *See also* App. 247.

—At the time of the fall of the Nationalist government in China, the White House staff found it necessary to review correspondence and cablegrams between former President Roosevelt and Generalissimo Chiang Kai-shek. Emerson Affidavit, Ex. D; App. 247.

—On various occasions the White House, on behalf of the Department of Justice, obtained documents in the Roosevelt papers necessary to defend the government in various litigations. Emerson Affidavit, Exs. E, G, K; App. 247-48.

—Members of the Department of Defense under President Kennedy sought access to papers in the Eisenhower library bearing on delicate arms negotiations with France. This request for access was rejected by Mr. Eisenhower's executor and, as a result, the Kennedy administration had to conduct the negotiations without the benefit of the important information the documents contained. Affidavit of Paul H. Nitze, App. 306-11.

—In 1967 President Johnson requested and obtained other papers in the Eisenhower library concerning the extent of America's military commitment to Israel. Such access was essential because the Israeli government had copies of the documents

whereas President Johnson did not. As President Eisenhower's executor testified in the congressional hearings on the Act at issue, "this gave the Israeli Government a certain advantage . . ." *Hearings Before the Subcommittee on Printing on H.R. 16902* at 81 (Oct. 4, 1974).

—Finally, as discussed above, it is clear that the very papers Mr. Nixon now seeks to control as his own personal property were needed by the Ford administration in the conduct of both foreign and domestic policy. See pp. 5-7, *supra*.[27]

Thus concern for the institution of the Presidency, as opposed to a former President's personal desire for secrecy, dictates that the materials at issue be retained as government property.

The best evidence on the question of whether the Act is destroying the Presidency as Mr. Nixon contends is the manner in which it has affected Presidents Ford and Carter. Mr. Ford never suggested during his two and one-half years in office that the "precedent" established by the Act was impairing his ability to discharge his duties in an effective and forthright manner. To the contrary, Mr. Ford's administration consistently defended the Act against Mr. Nixon's "presidential" challenge. And, of course, since January 20 of

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[27] Congress and President Ford also had more than ample evidence to conclude that the materials of the Nixon administration would be needed for various congressional deliberations and judicial proceedings, and, in fact, such requests have been made on a number of occasions during the pendency of this litigation. *See* pp. 7-9, *supra*. *See also* J.S. App. 60a-61a, 408 F. Supp. at 354. The need to preserve the materials at issue for future congressional and judicial proceedings was one of the factors that led to passage of the Act. *See* S. Rep. No. 93-1181, 93d Cong., 2d Sess. at 1, 4 (1974); H.R. Rep. No. 93-1507, 93d Cong., 2d Sess. at 2, 3, 8 (1974).

this year, President Carter's administration has likewise defended the Act against Mr. Nixon's attack.

Even more revealing is the fact that when Mr. Ford completed his term in office, he left all of the papers of his Presidency with the government and, unlike Mr. Nixon, did not reserve the right to withdraw "any or all" materials from government control.[28] The only materials Mr. Ford retained were (i) personal effects such as furniture, clothing, his personal library, stamp and coin collections; (ii) correspondence and notes sent to him by family members; and (iii) records relating to his personal financial affairs such as his bank accounts, savings, insurance, taxes, etc. 12 Weekly Compilation of Presidential Documents at 1711. All records relating to presidential matters were left in the custody of the federal government. Those materials will be reviewed by the same government archivists whose integrity Mr. Nixon impugns. *Id.* at 1712-13.[29]

Moreover, the bulk of the documents of Mr. Ford's administration will be made available to the public as soon as they have been processed. A small percentage of the materials are restricted from public access for a thirteen-year period, after which *all* of the records will

[28] 12 Weekly Compilation of Presidential Documents 1709-17 (Dec. 17, 1976). In addition to the materials relating to his years as President, Mr. Ford provided for government control over the papers relating to his life and work (i) "as a candidate for election to, and as Member of, the Congress of the United States during the period 1948 to 1973," (ii) "as Vice President of the United States in 1973 and 1974," (iii) "as candidate for nomination and election to become President for a subsequent term," and (iv) "as participant in a variety of other public and political activities." *Id.* at 1709.

[29] Mr. Ford recognized that some personal materials might be intermingled with the records of his administration.

be publicly available to the extent permitted by law. *Id.* at 1713. But even with respect to these documents, the director of the Ford presidential library (a publicly accountable official who is to be appointed by, and subject to the authority of, the Archivist of the United States) will have the authority, without Mr. Ford's approval, to remove the access restrictions with respect to particular materials if he concludes that the reasons for the restrictions no longer exist. *Id.* at 1713. Finally, the restricted files are to be made available to succeeding administrations upon request and are to be subject to subpoena and other lawful process at all times and without Mr. Ford's prior approval. *Id.*

Thus, it is clear that the Act has not had the dire consequences on succeeding administrations that Mr. Nixon imagines. Not only was Mr. Ford able to discharge his presidential duties despite the alleged "chilling" effect of the statute, but he also plainly felt that protection of the Presidency did not require him to destroy or maintain personal control over the records of his administration after he left office. We submit that this adherence by President Ford to the substance of the Act at issue is compelling proof that the "precedent" established by the Act will not impair the ability of future Presidents to discharge their constitutional responsibilities or to maintain their independence from the other branches of our government.

In addition to the views of the two Presidents who have succeeded Mr. Nixon, the record below clearly establishes, as the court below found, that the expectation of confidentiality in "presidential" communications is never absolute and diminishes rapidly once a President leaves office. Presidential advisors are well

aware that presidential papers from former administrations are customarily deposited in government libraries and that their recommendations may be disclosed in the memoirs of the President or fellow staff members.[30] Nevertheless, there is no evidence that the likelihood of such future disclosure has inhibited presidential counselors from giving the President their best, most candid advice.[31]

Mr. Nixon himself conceded that such "confidential communications" are often published in the form of memoirs and that, as President, he had no objection to such disclosures. Thus, although Mr. Nixon cited the debate within his administration over welfare reform as an instance where confidentiality was essential, he conceded that it was proper for Mr. Moynihan

[30] Reedy Affidavit (App. 302-06); Naughton Aff. (App. 322-29); Affidavits of John Roche and Richard Goodwin, filed July 31, 1975 in the court below.

Former presidential advisors have routinely published memoirs disclosing the previously confidential deliberations of the President and his staff. Thus, Robert Kennedy's *Thirteen Days* (1969) contains a detailed description of the conversations among President Kennedy, military leaders, Congressmen and presidential advisors during the Cuban Missile Crisis. Daniel Moynihan's *The Politics of a Guaranteed Income* (1973) describes the manner in which the Nixon Administration debated welfare reform proposals, including numerous direct quotations from conversations and memoranda sent by or to the President. And Jeb Stuart Magruder's *An American Life: One Man's Road to Watergate* (1975) describes and quotes from a number of the most "sensitive" intra-White House conversations and memoranda, showing Mr. Nixon and others involved in "Watergate" in an unfavorable light. *See also,* W. Safire, *Before the Fall: An Inside View of the Pre-Watergate White House* (1975); A. Schlesinger, *The Thousand Days* (1965); P. Salinger, *With Kennedy* (1936); R. Hilsman, *To Move a Nation* (1968).

[31] *See, e.g.,* Lisagor Aff. (App. 320-21); Naughton Aff. (App. 322-29); Reedy Aff. (App. 302-06).

to disclose confidential communications concerning that debate in a book published less than two years after the fact. Nixon Dep. Tr. at 38-39, App. 534; D. Moynihan, *The Politics of a Guaranteed Income* at 80-86, 96-97, 121, 160, 164-65, 171-73, 213-15 (1973).[32]

In other words, even if a presidential advisor has a basis for assuming that his memoranda and other communications will not be immediately disclosed, he must also realize that the modern "tradition" is for Presidents and their advisors to discuss the conduct of the Presidency from their respective vantage points at the conclusions of their terms in office and for all of the documents prepared by or for a President to be retained in a government-controlled library. There is thus no reason to indulge Mr. Nixon in his dire predictions that controlled public access to some presidential materials after the termination of an administration will inhibit all candid communication in the White House.[33]

[32] Indeed, Mr. Nixon established the White House taping system to assist him in writing his own memoirs. App. 182.

[33] There is similarly no merit in Mr. Nixon's speculation that, if the Act at issue is upheld, Congress will pass other legislation pertaining to the papers of the members of this Court. Such legislalation would clearly pose substantially different considerations than those involved here. Mr. Nixon's hypothetical ignores the fundamental difference in the bases for the authority of the President and the Court under the Constitution, as well as the manner in which each renders its decisions.

The President is part of a political process. He is the only official of our government elected by, and responsible to, all the American people. He has a direct and more or less contemporaneous responsibility to the public. Such public accountability demands that the people be as informed as possible on the bases of presidential decisions. The President formulates policy and makes decisions on the basis of whatever evidence and argument

Mr. Nixon argues that candid deliberations in the White House would be seriously impaired if the records of one administration were "entrusted to the hands of successor executive officials of differing political views, motivations and philosophies." App. Brief at 76-77. But if this fear were well-founded, it would apply not only to White House materials but to the files of cabinet officials and other presidential appointees as well. Obviously such officials, as well as the President, have a need for candid advice—including advice concerning the political consequences of their actions.

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he chooses to consider without regard for precedent. In general the legitimacy of presidential decisions results from procedures designed to promote informed consent through the political process.

By contrast, the Court is carefully insulated from the political process. The legitimacy of its decisions derives not from the votes of the people but from its attention to the record in the cases before it, the quality of its reasoning, and its respect for precedent. In order to promote reasoned decision-making, the decisions of the Court are confined to the record in individual cases presented to it by others. This record and all argument are already open to public scrutiny; *ex parte* communications are strictly forbidden. The decisions of the Court are thus self-contained, and the issues and the precise phrases chosen to express the decision are themselves among the critical judgments the Court has to make. It would undermine the legitimacy of the Court, and indeed would be highly improper, for an attorney or a judge to argue that a decision of the Court did not mean what it said because it was founded on some evidence or judicial reasoning other than that contained in the formal, public record.

These differences between the executive and judicial branches have been recognized in prior statutes relating to the preservation and disclosure of federal records. *See* Freedom of Information Act, 5 U.S.C. § 552(e); Privacy Act of 1974, 5 U.S.C. § 552a. These statutes exclude judicial records from their coverage.

In any event, in order for Mr. Nixon's analogy to judicial records to be complete, the hypothetical legislation would have to provide for preservation of judicial papers in the custody *of the judiciary* and for review of such materials by members of the judicial branch.

(The recent deliberations of two successive Secretaries of Transportation concerning the flights of supersonic aircraft into the United States and the approval of interstate highway projects in the Washington, D.C. area are illustrative.) Yet the records of these officials have traditionally been left to succeeding administrations, and there is no evidence that the ability of cabinet officers to discharge their duties has been irreparably impaired as a result.[34]

Finally, a proper judgment on the effect of the Act on future Presidents must take account of the unique circumstances surrounding Mr. Nixon's departure from office and the unique provisions of the Nixon-Sampson agreement, which gave Mr. Nixon the right to withdraw any materials from government control and an absolute veto over access by anyone, including succeeding Presidents, to the records of his administration. Mr. Nixon's assumption that the actions of future Presidents will require the enactment of remedial legislation similar to the Act at issue is thus clearly unwarranted. Indeed, the recent transition in administrations—together with the arrangements for continual government control over the records of the

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[34] The most recent illustration of this tradition is the procedures that were followed when the Ford administration completed its term in January 1977. On November 19, 1976, the Archivist of the United States published a notice in the *Federal Register* reminding all executive agency heads of the provisions of the Federal Records Act and attendant administrative regulations mandating continual governmental control over all "materials made or received either in pursuance of Federal law or in connection with the transaction of public business." The Archivist cautioned the agency heads that a document "designated 'personal,' 'confidential,' or 'private,' etc., but relevant to the conduct of public business, is nonetheless an official record subject to the provisions of Federal law pertinent to the maintenance and disposal of such records." 41 Fed. Reg. 51149 (Nov. 19, 1976).

Ford administration—demonstrates that such measures should not be required with respect to the papers of future Presidents.

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There is, in short, no basis for Mr. Nixon's stated concern for the confidentiality of the communications of future Presidents. There is nothing in the Act that precludes future Presidents from asserting legitimate governmental privilege over the papers of their own administrations and those of Mr. Nixon as well. This Court has previously rejected excessive claims of separation of powers and presidential privilege when Mr. Nixon asserted them as an incumbent. *United States* v. *Nixon,* 418 U.S. 683 (1974). Surely such blanket claims must be rejected here, where the incumbent President opposes them and where Mr. Nixon concedes that he saw no more than one percent of the materials at issue. Even if Mr. Nixon has some remaining right to assert presidential privilege, the record below establishes that any intrusion on that privilege by the preservation and classification of the materials at issue by government archivists working under strict standards of confidentiality is more than justified by the important governmental and public interests in the records of his administration.

II. GOVERNMENT CONTROL OVER THE MATERIALS AT ISSUE IS SUPPORTED BY HISTORICAL AND LEGAL TRADITION AND WAS WITHIN THE AUTHORITY OF CONGRESS AND THE PRESIDENT.

Mr. Nixon asserts that his separation of powers argument is "underscored" by what he describes as the "unvarying" practice of "every" prior President. App. Brief at 90-92. This tradition, he argues, justifies his exclusive ownership and control over the millions

of documents generated by the White House staff during his tenure in office, and precludes subsequent congressional and presidential action to protect the critical governmental interests in those materials.

In the previous section we discussed the inherent invalidity of Mr. Nixon's "presidency" arguments. Here we will show that insofar as "tradition" is relevant to the Court's assessment of the constitutionality of the Act in question, the evolving historical and legal practice with respect to the papers of the President and other executive officials actually supports continued government custody. We will show that Mr. Nixon's highly selective and oversimplified view of history ignores the unmistakable evolution toward comprehensive government custody of the governmental records of all executive officials, including the President and his immediate advisors. Finally we will show that, quite apart from any such tradition, Congress and President Ford were fully empowered to act as they did to preserve the records of Mr. Nixon's years in office.

A. Preservation of the Nixon Administration Records Was Consistent with Tradition and the Practice of Recent Decades.

1. The Practices of Prior Presidents Support Preservation of the Materials at Issue.

Any analysis of the practices of prior Presidents with respect to the papers of their administrations must begin with the fact that the Executive Office of the President, and the documents it generates, have changed dramatically in recent decades. The collected papers of Thomas Jefferson, for example, amounted to only 50,000 documents over his entire lifetime, and only a small percentage of those were generated during

his Presidency. I *The Papers of Thomas Jefferson* (J. Boyd, ed. 1950) at xii. This modest amount—about one-tenth of one percent of the documents Mr. Nixon now claims—is not surprising when one considers that during Jefferson's administration the entire White House staff consisted of one secretary and a few clerks who merely copied official documents.

Nor does the amount of material generated by Mr. Jefferson differ significantly from those accumulated by other Presidents prior to the expansion of the Executive Office in the 1930's. The entire collected works of James Madison contain approximately 22,000 items; Rutherford Hayes accumulated some 75,000 items, but again only a relatively small portion came from his Presidency. Library of Congress, *A List of Collections in the Manuscript Division* (Nov. 19, 1976) at 191; I *The Papers of James Madison* (T. Hutchison, ed. 1962) at xxiv; P. Hamer, *A Guide to Archives and Manuscripts in the United States* (1961) at 492.

The volume of presidential materials did not change greatly in the early twentieth century. For example, all of the documents collected throughout the career of Woodrow Wilson amount to approximately 275,000 pages, and, again, only a portion of those were generated during his years as President. Library of Congress, *A List of Collections in the Manuscript Division, supra,* at 343. But all this changed dramatically with the Executive Reorganization Act of 1939. By 1954, the Executive Office staff, which had outgrown the White House, consisted of 1,175 persons. By 1971, under Mr. Nixon, the Executive Office staff had reached 5,395. E. Hargrove, *The Power of the Modern Presidency,* 80-81 (1974).

This dramatic increase in personnel reflected, of course, a dramatic change in the scope and complexity of the problems dealt with by the White House and in the manner in which presidential decisions were made. As James MacGregor Burns has stated:

> "The White House has changed enormously as an institution. . . . The individual presidency has come to be absorbed in the broader White House bureauracy. . . . The President is *primus inter pares,* but a great deal of decision-making emerges from the interplay of the large personal and institutional staff around the President." Affidavit of James MacGregor Burns, App. at 318.

Thus under Mr. Nixon, the Office of the President consisted not only of the White House staff, but also of the Office of Management and Budget, the Domestic Council, the National Security Council, the Council of Economic Advisors, the Council on Environmental Quality, the Office of Economic Opportunity, the Office of Telecommunications Policy, the Special Action Office for Drug Abuse Prevention, the Federal Property Council and other specialized offices and councils dealing with every phase of our federal government. E. Hargrove, *The Power of the Modern Presidency,* 80-81 (1974). *See also,* U.S. Government Manual, 1973/74 at 77-90.

The documents generated by Presidents prior to Franklin Roosevelt thus defy comparison with the vast archives generated by the institutionalized White House under Mr. Nixon—either in terms of the nature of the records involved, the interests affected, or the public importance of maintaining government custody. There is simply no basis for inferring that the practices followed in preserving the earlier records are in

any way appropriate for those of recent presidencies. Nevertheless, the fact is that many of our former Presidents considered even their far smaller, far more personal collections to be public property. President Jefferson, for example,

> "was extremely meticulous in depositing in the various departmental offices . . . every document having any relation to the conduct of public business . . . . Jefferson unquestionably employed every opportunity offered by the presidency to see to it that the public records of the office remain in public custody." Affidavit of Professor Julian P. Boyd, App. at 330-31.

Similarly, President Taft supported the idea of a national archives to house government records, including those of the President. Unfortunately, no such depository was available at the end of President Taft's term and, therefore, after leaving office, he asked the White House Executive Clerk to send his papers to him. He carefully preserved all of the documents, and they were returned to the Library of Congress a few years later.[35]

This is not to say that Mr. Nixon's contention that he has the exclusive right to destroy the records of his years in office is totally unprecedented. At least one other President—or, more accurately, his widow—exercised the same right to destroy presidential papers now sought by Mr. Nixon. Mrs. Warren Harding

[35] App. 492-93. *See* App. 488-95 for a brief description of the varying practices of eight former Presidents. *See also* H. G. Jones, *The Records of a Nation: Their Management, Preservation, and Use* (1969); J. Frank Cook, "Private Papers" of Public Officials, 38 *The American Archivist* 299, 306 (1975) (George Washington "throughout his career . . . maintained his papers for eventual use by historians. . . .").

burned more than half of the papers generated during her husband's presidency, thereby depriving succeeding administrations, Congress, and the nation as a whole of records that might have been used in enacting needed reforms.[36]

Fortunately Mrs. Harding's practice was not followed by her husband's successors. As the late Professor Herman Kahn—a leading authority on presidential papers—testified during the congressional hearings on the Act at issue:

> "[S]ince President [Franklin] Roosevelt's time, it has become a part of our unwritten constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately upon departing the White House, have made their papers the property of the Federal Government." *Hearings Before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902* at 95-96 (October 4, 1974). *See also* App. 494-95.

While relying on another portion of Professor Kahn's testimony, Mr. Nixon totally ignores this important reminder that Presidents Roosevelt, Truman, Eisenhower, Kennedy and Johnson "immediately upon departing the White House . . . made their papers the property of the Federal Government." Mr. Nixon obviously hopes to avoid the fact that the Nixon-Sampson agreement constituted a radical departure from this "tradition" of his five immediate predecessors, who

[36] Lentz, *The Warren G. Harding Papers* (1970) at 3 & n.3, App. 493-94. *See* also J.S. App. 47a-48a n.34, 408 F. Supp. at 348 n.34. Mr. Nixon acknowledges that the right to destroy historical records is part of the "tradition" that he seeks to uphold. *See* App. Brief at 92-93.

have since been joined by President Ford as well.[37] For that agreement did not provide that the papers of Mr. Nixon's years in office would be preserved as the property of the federal government. To the contrary, it specifically stated that Mr. Nixon was to "retain all legal and equitable title to the Materials," and gave Mr. Nixon the right, after three years, "to withdraw from deposit without formality any or all of the Materials . . . for any purpose or use [he] may deem appropriate." App. 39-40.

Thus, insofar as the practices of prior Presidents are relevant to an assessment of the constitutionality of the Act at issue, the "unwritten constitution" established by the actions of all recent Presidents other than Mr. Nixon supports the invalidation of the Nixon-Sampson agreement and the preservation of the records of Mr. Nixon's years in office under continued governmental control.

2. Preservation of the Materials at Issue Is Supported by the Evolving Tradition of Joint Congressional-Executive Control of the Records of the Executive Branch.

In the course of his highly selective review of "prior practice," Mr. Nixon also ignores the evolving tradition of cooperation between the executive and legislative branches in regulating the disposition of documents generated by executive officials.

With the approval and cooperation of the President, Congress has developed a comprehensive regime for

[37] As discussed above, President Ford returned to the prior "tradition" of Mr. Nixon's predecessors when he provided—in sharp contrast to the Nixon-Sampson agreement and in accord with the Act at issue—that all of his presidential papers would remain subject to governmental control upon the completion of his term in office. *See* pp. 36-37, *supra*.

the disposition of executive documents. In 1950 Congress enacted, and President Truman signed, the Federal Records Act. That statute provides that documents generated or acquired during the transaction of government business are public records, which can only be "alienated or destroyed" in accordance with publicly established regulations designed to protect the public interest. 44 U.S.C. §§ 2701 *et seq.*, 3314. *See also Dayton* v. *McGranery,* 201 F.2d 711, 713 (D.C. Cir. 1953).[38]

In 1950 and 1955 Congress authorized the creation of presidential libraries to permit government records generated during presidential administrations, as well as other historical materials relating to the President, to be housed in government depositories. *See* 44 U.S.C. §§ 2107-08. These statutes, which proceed on the assumption that White House records would remain in government hands, provided for public custody of those important materials without addressing the question of ownership.[39]

[38] Government records subject to the Federal Records Act are broadly defined to include:

> "all books, papers, maps, photographs, or other documentary materials . . . made or received by an agency of the United States Government . . . in connection with the transaction of public business and preserved or appropriate for preservation . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government . . . ." 44 U.S.C. § 3301.

The General Counsel of the General Services Administration recently outlined the comprehensive nature of the Act when former Secretary of State Kissinger purported to claim certain files relating to government business as his personal property. *See* Memorandum from General Counsel of GSA to James Rhoads, Archivist of the United States, dated February 3, 1977. *See also* p. 67 n. 59, *infra*.

[39] Mr. Nixon argues that these acts indicate legislative acquiescence in a tradition permitting outgoing Presidents to remove their

In 1966 and again in 1974 Congress, again with the approval of the incumbent Presidents, enacted and then extended the Freedom of Information Act to provide for controlled public access to many of the executive records preserved by the Federal Records Act. 5 U.S.C. § 552.[40] Under the FOIA, Congress sought to balance the public's interest in access to the records of its government with certain specific governmental privileges.[41] Similarly, in the Privacy Act of 1974, 5 U.S.C. § 552a, Congress established a definitive set of rules governing disclosure and nondisclosure of executive branch files relating to individual citizens. And of course Title II of the Act at issue—establishing a national study commission on the records of all federal officials—represents a further collaborative effort which is the forerunner of future programs to identify and protect the various public interests in government documents. 44 U.S.C. §§ 3315-3324.[42]

This Court has frequently considered the balance achieved by this evolving system of control over records of the executive branch but has never held, or even suggested, that Congress exceeded its authority when it enacted these statutes. *See Department of the Air Force* v. *Rose*, 425 U.S. 352, 360-62 (1976); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 135-37 (1975); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 16-20 (1974); *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 79-80 (1973). Yet Mr. Nixon now contends that the mere preservation of such documents is an unconstitutional encroachment by the legislature on executive prerogative. He argues that millions of documents that were subject to government control during his tenure in office must now be taken from government custody and must be given to him to disclose or destroy as he alone sees fit. These claims, if approved by the Court, would thus nullify both the Federal Records Act and

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records from government custody. App. Brief at 98-99. However, after a thorough analysis of the statutes and their legislative histories, the district court in the "consolidated cases" held that the Presidential Libraries Act did *not* confer ownership of presidential materials on former Presidents. *See Nixon* v. *Sampson, supra*, 389 F. Supp. at 143-45.

[40] President Ford objected to certain aspects of the 1974 amendments to the Freedom of Information Act but, significantly for present purposes, he stated that he generally supported its "laudable goals." Specifically President Ford did not raise any objection to the portion of the amendments which made it clear that the Act applied to the Executive Office of the President. *See* 5 U.S.C. § 552(e); 120 Cong. Rec. H10705 (November 18, 1974).

[41] The "consolidated cases" involved claims under the FOIA by the intervening parties to the materials here at issue. Accordingly, we presented the Court with a lengthy analysis—reprinted in the congressional hearings on the Act at issue—demonstrating that (i) the FOIA applies to "presidential materials" and (ii) Mr. Nixon's assertion of exclusive ownership conflicted with the FOIA. More particularly, we demonstrated that the exemptions in 5 U.S.C. § 552(b) did not exempt the presidential materials claimed by Mr. Nixon. *Hearings before the Subcommittee on Printing of the Committee on House Administration on H.R. 16902* (Oct. 4, 1974) at 190-99.

[42] These statutes have been implemented by extensive systems of regulations throughout all executive branch departments and agencies. The executive branch has thus been a willing participant in these attempts to improve the efficiency, continuity and accountability of the government. *See, e.g.*, 41 C.F.R. § 101-11.000 *et seq.* (GSA regulations under the Federal Records Act); 22 C.F.R. § 6.1 *et seq.* (State Department regulations under the Freedom of Information Act); Attorney General's Memorandum for the Executive Departments and Agencies on the Public Information Section of the Administrative Procedure Act, June 1967.

the Freedom of Information Act with respect to the records of Mr. Nixon's administration.[43]

* * *

What then are the lessons of history regarding presidential records?

a. The starting point for considering the historical practices discussed above is to be found in the fundamental constitutional principles which underlie our government, and which of course also constitute a part of our history. Those principles clearly bear on the responsibility of the President concerning the records of his office and provide a sound context for evaluating subsequent conduct. They make clear, for example, that while broad authority is vested in one Chief Executive, sovereignty remains in the people; that the President is accountable politically and sometimes legally for his fidelity in executing the laws and for his judgment in exercising discretionary functions; that the people, through Congress, are empowered to alter many of the actions and decisions of the Chief Executive on the basis of current information concerning the government's actions; and that continuity of government is expected despite changes in the person occupying the Presidency.

[43] It should be noted that Mr. Nixon's assertion of personal ownership and control over government documents is also at odds with congressional enactments and executive regulations designed to prevent the disclosure of national security or other sensitive information. *See e.g.*, Executive Order No. 11,652, 3 C.F.R. 339 (1974) (providing for a comprehensive classification system applicable to many of the materials at issue); 18 U.S.C. § 1905 (prohibiting disclosure of confidential information provided to executive agencies); 26 U.S.C. § 7213 (prohibiting disclosure of tax return information); 5 U.S.C. § 552a (prohibiting disclosure of confidential information concerning private citizens).

b. As noted previously, our tradition includes numerous examples of Presidents who clearly recognized that preservation of the records of their office was important to carrying out these fundamental principles, as well as examples of Presidents who perceived this connection imperfectly, if at all. It includes some who acted with high responsibility and some who did not. It includes vast historic changes in the nation and in the powers and functions of the Presidents, making it increasingly important to establish sound public records systems. And it includes major efforts by recent Presidents and Congress to do so.

c. The Act here at issue is thus clearly consistent with tradition. It is merely a further implementation of a well-established effort, underway for over four decades, to bring presidential practice into line with constitutional requirements. It is true that the Act was adopted in the face of a sudden and severe challenge from a resigning President who had demonstrated a certain insensitivity to the constitutional principles mentioned above and who, it was feared, would not exhibit the growing sense of responsibility toward presidential records shown by other recent Presidents. But the harsh circumstances giving rise to the Act merely underscore its conservative purpose. In sum, it was not the Act which departed from tradition, it was Mr. Nixon."[44]

[44] Mr. Nixon has sometimes argued that the "deeply rooted" and "unvarying" tradition he refers to is not the actual removal of White House records by all prior Presidents, which as shown above did not occur, but rather the fact that every President had the opportunity to *decide* whether he would remove such materials. *See, e.g.*, App. Brief at 92-93. Thus even though most Presidents took pains to preserve government custody of the records of their administrations, Mr. Nixon argues that the

3. This Court's References to Tradition Do Not Vest Mr. Nixon With the Right to Exclusive Personal Control of the Government Records at Issue.

Even if Mr. Nixon's contention that all prior Presidents considered the papers of their administrations to be their own personal property were true, it does not follow that Congress and President Ford were thereby precluded from extending the evolving system of regulation to the materials of the Nixon administration. To be sure, a "systematic" and "unbroken" tradition can "give meaning" to the text of a statute or constitutional provision, but even "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

In this case the "tradition" asserted by Mr. Nixon is far from "systematic" or "unbroken." Surely it cannot prohibit or subordinate remedial legislation enacted by Congress and signed by the President. Neither Congress, the President nor this Court is condemned to the "blind formalism" of adhering to traditions

fact that they had the *opportunity* to do otherwise establishes his *right* to do otherwise.

This argument does nothing more than point out that the responsibilities of Presidents regarding their records have in the past been largely dependent on self-enforcement, whereas in Mr. Nixon's case an administrative system was established to insure that public records are treated in accordance with public interests. Many legal obligations and public responsibilities depend heavily on self-enforcement—including for example the duty of a judge to decide a case impartially. But the fact that a duty has traditionally been without administrative enforcement does not preclude Congress from determining, as in this case, that self-enforcement is proving unreliable and more effective means must be established.

which no longer have any basis in reality. *See Williams* v. *Florida,* 399 U.S. 78, 103 (1970). As this Court has held, such traditions, however ancient, cannot be allowed to prevail "by sheer inertia rather than by reason of any intrinsic merit." *United States* v. *Reliable Transfer Co.,* 421 U.S. 397, 410 (1975).[45]

Significantly, none of the cases cited by Mr. Nixon holds that any such "tradition" can invalidate an act of Congress signed into law by the President. *See United States* v. *Midwest Oil Co.,* 236 U.S. 459 (1915); *Inland Waterways Corp.* v. *Young,* 309 U.S. 517 (1940); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).[46] Only last term, this Court noted, in striking down a practice that allegedly had the blessing of history:

> "Partisan politics bears the imprimatur only of tradition, not the Constitution.
>
> " 'It may be correct that the patronage system has been followed for "almost two hundred years" and therefore was in existence when the Constitution was adopted. However . . . if the age of a perni-

[45] As Justice Holmes recognized:

> "It is revolting to have no better reason for a rule of law than that it was laid down [long ago]. It is even more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of Law,* 10 Harv. L. Rev. 457, 469 (1897).

[46] In *Midwest Oil,* for example, the Court upheld a long standing presidential practice concerning the disposition of government property, but only after finding that the practice had the clear "acquiescence" of Congress and that Congress could "disaffirm" the tradition at any time. 236 U.S. at 471, 474-75. And in *Youngstown Sheet & Tube,* the Court, in order to vindicate congressional authority, rejected excessive claims of presidential power despite an alleged "tradition" established by prior Presidents. 343 U.S. at 588-89.

cious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure. . . .' " *Elrod* v. *Burns,* 96 S. Ct. 2673, 2687 n.22 (1976), *quoting from Illinois State Employees Union* v. *Lewis,* 473 F.2d 561, 568 (7th Cir. 1972).

For these reasons, the alleged "tradition" upon which Mr. Nixon relies is not a barrier to the reform measure adopted by Congress in response to the Nixon-Sampson agreement.

B. Congress and President Ford Had Authority to Assert Public Control Over the Presidential Materials

The legislative history of the Act sets forth three legal bases for establishing government control over the materials in question.

If the materials are already government property—which Congress recognized was a decision for the courts—the statute would be an exercise of congressional power under Article IV, Section 3 of the Constitution to dispose of and make rules respecting the property of the United States.

If the materials are private property, there are two sources of legislative authority: "the Federal Government may take 'protective custody' of [presidential] material which is necessary for the continuing use of the Federal Government where it is in the public interest to do so," and "the legislation would, if necessary, exercise the power of eminent domain." H. Rep. No. 93-1507, 93d Cong., 2d Sess. (1974) at 7.[47]

[47] *See also,* S. Rep. No. 93-1181, 93d Cong., 2d Sess. (1974) at 4-6; 120 Cong. Rec. 33846 (Oct. 3, 1974) (Remarks of Sen. Ervin); 120 Cong. 33850-51 (Oct. 3, 1974) (Remarks of Sen. Nelson); 120 Cong. Rec. 33859 (Oct. 3, 1974) (Remarks of Sen. Javits); 120 Cong. Rec. 33874 (Oct. 3, 1974) (Remarks of Sen. Huddleston).

1. *The Records Were Government Property Subject to Regulation by Congress Under Article IV of the Constitution.*

Congress has plenary power to regulate the disposition of federal property under what this Court has described as the "broad terms" of Article IV, Section 3, clause 2 of the Constitution. *Kleppe* v. *New Mexico,* 96 S. Ct. 2285, 2291 (1976); *Alabama* v. *Texas,* 347 U.S. 272, 273-74 (1954); *United States* v. *San Francisco,* 310 U.S. 16, 29-30 (1940); *Ashwander* v. *TVA,* 297 U.S. 288, 336 (1936).[48] The presidential materials of the Nixon administration have been the property of the government from the outset and are thus subject to appropriate legislation under this constitutional power.

Under familiar common law principles, every employee owes a fiduciary duty to his employer, and, for that reason, the employer has an exclusive, or at least superior, right to all works created by the employee during the course of his duties. *Scherr* v. *Universal Match Corp.,* 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied,* 397 U.S. 936 (1970); *Brattleboro Publishing Co.* v. *Winmill Publishing Corp.,* 369 F.2d 565, 567-68 (2d Cir. 1966); *Nelson* v. *Radio Corporation of America,* 148 F. Supp. 1, 3 (S.D. Fla. 1957); *Sawyer* v. *Crowell Publishing Co.,* 46 F. Supp. 471, 473 (S.D.N.Y. 1942), *aff'd,* 142 F.2d 497 (2d Cir.), *cert. denied,* 323 U.S. 735 (1944).

This principle has long been recognized as applying with equal or greater force to government officials. *See,*

[48] Only last year, this Court reaffirmed that in evaluating legislation designed to preserve government property, the Court will not "reweigh the evidence and substitute [its] judgment for that of Congress." *Kleppe* v. *New Mexico,* 96 S. Ct. 2285, 2292 n.10 (1976).

e.g., Coleman v. *Commonwealth,* 25 *Gratten* (66 Va.) 865, 881 (1874). The federal courts have consistently held that the federal government owns any documents or other works created by government employees within the scope of their official duties. *Scherr, supra,* 417 F.2d at 499-500; *United States* v. *First Trust Co. of St. Paul,* 251 F.2d 686, 688 (8th Cir. 1958); *Sawyer, supra,* 46 F. Supp. at 473; *United States* v. *Chadwick,* 76 F. Supp. 919, 923 (N.D. Ala. 1948). *See also Haas* v. *Henkel,* 216 U.S. 462, 477-80 (1910). Only where the fruits of an official's labors are clearly outside the scope of his government duties may he assert exclusive personal ownership. *Public Affairs Associates, Inc.* v. *Rickover,* 268 F. Supp. 444 (D.D.C. 1967).[49]

[49] In *Rickover,* certain speeches of the Admiral were at issue. The court, finding that the speeches were written at the Admiral's home during his leisure time and that he was not on duty or acting in an official capacity when he delivered them to private audiences, held that the speeches were not government publications. 268 F. Supp. at 447-49.

Mr. Nixon attempts to avoid *Rickover* and its endorsement of the general rule that the work product of government employees is government property by arguing that it involved the right to copyright, rather than the "ownership" of, the speeches. App. Brief at 97 n.36. As stated in *Rickover,* however, the question there was whether the Admiral could assert an exclusive proprietary interest in the speeches so that no one else could use their contents without his permission:

> "May a Government employee who prepares and delivers a speech on his own time, on a subject relating to or bearing directly on his employment, claim a proprietary interest in that speech and copyright it as a protection against its unauthorized use? The fundamental determination in resolving that issue is whether the disputed speeches fall within the purview of Admiral Rickover's official duties." 268 F. Supp. at 448.

Since the Act here guarantees Mr. Nixon the right to copy all the materials, the question of *exclusive* control is also the critical question in this case, and the answer depends, as in *Rickover,* on whether or not the materials were created by Mr. Nixon and his aides within the scope of their duties or in the exercise of the powers of the President.

Mr. Nixon contends that these rules of law simply do not apply to former Presidents. But our system of government does not permit any one man to stand above others. All are equally bound by the Constitution and laws of the United States.[50] Unlike a monarch, the President's powers derive solely from the trust placed in him by the electorate. They do not inure to him as an individual. Sovereignty resides in the people, and the President serves as their fiduciary to "take Care that the Laws be faithfully executed" U.S. Const. Art. II, § 3.[51]

Applying these well-established principles, the district court in the "consolidated cases" found that, quite apart from the Act in question, the vast preponderance of the materials at issue were in fact created by executive branch officials, on government time, utilizing government resources, as part of their official government duties. The court therefore held that the materials were the property of the federal government and not the personal property of Mr. Nixon. *Nixon* v. *Sampson,* 389 F. Supp. 107, 133-37 (D.D.C. 1975).[52]

[50] "All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it." *United States* v. *Lee,* 106 U.S. 196, 220 (1882).

[51] As the Court of Appeals stated in *Nixon* v. *Sirica,* 487 F.2d 700, 711 (D.C. Cir. 1973):

> "Though the President is elected by nationwide ballot, and is often said to represent all the people, he does not embody the nation's sovereignty. He is not above the law's commands: 'With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . .' *Sovereignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen.*" (Emphasis added.)

[52] The absurdity of Mr. Nixon's ownership claim is all the more evident when one considers that the vast preponderance of the records claimed as his property were produced and received by other executive branch officials and were never even seen by him.

2. Congress Had Power to Assert Custody Over the Records Even If They Were Not Already Government Property.

(a) *Power to protect the continuity of the Government.* The government's paramount interest in the information contained in the records of previous administrations was explicitly recognized by Justice Story in *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (C.C.D. Mass. 1841)—the leading decision cited by Mr. Nixon in support of his contention that *he alone* should have control over access to the records of his Presidency.

In *Folsom,* Justice Story was confronted with the competing copyright claims of two private parties to some of the personal papers of President Washington —papers which had already been published and which were therefore fully available to both government officials and the public alike. Justice Story was thus not confronted with the situation here, where a private citizen seeks to assess personal ownership *as against the government* over records that are not otherwise available. Nevertheless, Justice Story anticipated the instant case when he warned that there might well be future cases where

> "from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government to give them publicity, even against the will of the writers." 9 Fed. Cas. at 347.

He thus recognized that, regardless of the ownership of presidential records, the information they contain is often so vital to the functioning of the government

that no private citizen can be allowed to keep them from succeeding administrations.[53]

As Justice Story perceived, the Constitution contemplates a continuing government, with many programs extending beyond the tenure of any one President. Congress is authorized by its substantive legislative powers, as well as by the "necessary and proper" clause,[54] to provide for the orderly transition from one Administration to another.[55] Without the aid of Con-

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[53] Mr. Nixon attempts to limit *Folsom* to documents involving only matters of "national security and current government business." App. Brief at 117. But, as the portion of Justice Story's opinion quoted above makes clear, the need for preserving presidential papers recognized in *Folsom* extends to documents "embracing *historical* . . . information" as well. 9 Fed. Cas. at 347 (emphasis added).

Similarly, *In re Roosevelt's Will*, 73 N.Y.S. 2d. 821 (Sur. Ct. 1947), provides no support for Mr. Nixon's claim of personal ownership but rather is entirely consistent with the view that, regardless of legal title, the government has a paramount interest in the papers of a former President. The question of ownership was neither raised nor discussed in the *Roosevelt* case. The court simply declared that President Roosevelt's gift of his papers to a presidential library maintained and controlled by government archivists was valid to confer such title as he might have had. The court noted that President Roosevelt had publicly stated *"that the ownership and title of all the papers, books, et cetera, should be in the Federal Government itself." Id.* at 823 (emphasis added).

[54] Constitution, Art. 1, Sec. 8, cl. 18.

[55] An example of an exercise of this power is the Presidential Transition Act of 1963, where Congress provided for a number of services and facilities to insure the orderly transition of power from one Administration to the next. In that Act, Congress declared that:

> "The national interest requires that such transitions in the office of President be accomplished so as to assure continuity in the faithful execution of the laws and in the conduct of the affairs of the Federal Government. . . ." 3 U.S.C. § 102 note.

gress, an incoming President would be powerless to prevent his predecessor from disrupting the continuity of government.[56]

Mr. Nixon now concedes that "the right of the executive branch to secure particular materials of [his] administration for current government business has been established by historical practice and by *Folsom* v. *Marsh*." App. Brief at 116-17. But elsewhere he asserts, rather inconsistently, that "the right to control access to and disposition of the materials of his office" is vested in him personally by the Constitution and is not subject to abridgement by Congress. App. Brief at 94. And, of course, he fails to explain how succeeding administrations will be able to enforce the right he concedes they have under *Folsom* v. *Marsh* if, pursuant to the Nixon-Sampson agreement, he refuses to allow such access or exercises his "right" to destroy the documents sought by his successors.

(b) *Power of eminent domain.* It is clear that the government was also authorized to retain and preserve many of the documents at issue, without regard for their legal title, through a proper application of its extensive powers of eminent domain. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680-81 (1896). *See also Roe* v. *Kansas ex rel. Smith*, 278 U.S. 191, 192-93 (1929). This Court has consistently held that congressional findings on the public importance of such property are not to be lightly set aside. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 551-52 (1946); *Berman* v. *Parker*, 348 U.S. 26, 32 (1954).

[56] Legislation preserving White House records also serves the constitutional purpose of helping to insure that incumbent Presidents faithfully execute the laws.

Here it is clear that the records of one of the most important and turbulent periods in our nation's history were quite properly preserved in order to insure that government officials and the nation as a whole would learn from our past mistakes so as to not be condemned to relive them in the future.[57]

In sum, Congress and President Ford had ample authority to establish government custody over the records of Mr. Nixon's years in office, and such action was entirely consistent with the nation's tradition.

III. THE ACT DOES NOT VIOLATE ANY OF MR. NIXON'S PERSONAL RIGHTS

In addition to his claim that the Act will irreparably injure the Presidency, Mr. Nixon alleges that the statute abridges several of his own constitutional rights. It should be noted at the outset that all of these arguments are based on an erroneous premise, namely that Mr. Nixon "owned" the materials at issue prior to the Act. If he is wrong on this issue (see pp. 56-59,

[57] Mr. Nixon concedes that government preservation of even personal papers for future historical examination is not unprecedented. App. Brief at 141, n.64. He notes that following the assassination of President Kennedy, the government seized the diaries, political writings, and other personal papers of Lee Harvey Oswald. *See* 31 Fed. Reg. 13968-74 (Oct. 31, 1966); *Porter* v. *United States*, 473 F.2d 1329, 1332 (5th Cir. 1973). Legislation was later enacted to provide for the continued preservation of the materials and for compensation to Oswald's heirs. 79 Stat. 1185, Pub. L. No. 89-318. As Mr. Nixon notes, there was never any challenge to the constitutionality of that legislation.

Mr. Nixon attempts to distinguish this precedent on the grounds that the Oswald legislation was enacted after the initial seizure of the papers. We submit that if there is any force to this distinction, it is that the Act presently under consideration, which was signed into law prior to government action, is, for that reason, all the more constitutional.

supra), his arguments all must fail, for it cannot be a bill of attainder, invasion of privacy, unreasonable search and seizure, or abridgement of freedom of speech for the government to provide for the preservation, use, and disclosure of documents which have been owned by the government all along.

We now turn to an examination of each of Mr. Nixon's personal constitutional claims.

A. The Act Does Not Constitute a Bill of Attainder

Mr. Nixon contends that the Act is an unconstitutional bill of attainder because it regulates the disposition of the papers of his administration without establishing similar rules with respect to the papers of all other past and future Presidents. App. Brief at 130-41. The court below unanimously rejected this argument. J.S. App. 97a-103a, 408 F. Supp. at 371-74. The court found that it was entirely appropriate for the government to act promptly to preserve the records of Mr. Nixon's administration, given the fact that Mr. Nixon was the only President since 1929 whose papers had not been deposited in a government-controlled presidential library. J.S. App. 93a-94a, 408 F. Supp. at 370. The court further found that Congress was entirely justified in concluding that the government, rather than Mr. Nixon, was the proper custodian for the materials at issue. J.S. App. 96a, 408 F. Supp. at 371. The court concluded that, particularly since the Act fully protects any legitimate privacy and property rights that Mr. Nixon has in any of the materials, (J.S. App. 102a, 408 F. Supp. at 373-74) Mr. Nixon's characterization of the Act fell "far short of making out a meritorious bill of attainder claim." J.S. App. 98a, 408 F. Supp. at 372.

In order to escape these sound conclusions of fact and law, Mr. Nixon now argues that *United States* v. *Brown,* 381 U.S. 437 (1965), stands for the proposition that a bill of attainder exists whenever a statute affects an individual or group of persons without applying to all other persons who are arguably similarly situated. This is plainly incorrect. The fact that only one person is in possession of government property clearly does not prevent the government from recovering that property. And even where the person has legal title to property, the power of eminent domain permits the government to take it for government use (so long as just compensation is paid) without simultaneously taking the property of all persons similarly situated.

Acceptance of Mr. Nixon's reading of *Brown* would have the effect of overturning numerous decisions of this Court holding that the government may address an immediate aspect of a problem without concurrently attempting to eliminate the entire evil. As the Court stated in *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 400 (1937):

> "If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms."

Similarly in *Katzenbach* v. *Morgan,* 384 U.S. 641, 657 (1966), the Court held:

> "[I]n deciding the constitutional propriety of the limitations in such a reform measure we are guided by the familiar principles that a 'statute is not invalid under the Constitution because it might have gone farther than it did,' . . . that a legislature

> need not 'strike at all evils at the same time,' . . . and that 'reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind'. . . ."[58]

The distinguishing feature between the remedial legislation that was upheld in *Parrish* and *Katzenbach* and the unlawful bill of attainder that was struck down in *Brown* is that a bill of attainder involves a finding of guilt and the imposition of punishment without the benefit of judicial review. If Mr. Nixon were correct in his assertion that a bill of attainder exists whenever a particular person or group is the subject of a legislative enactment, legislation would become unconstitutional whenever Congress addressed itself to an immediate issue and failed to enact a comprehensive legislative scheme.

In arguing that a bill of attainder need not be punitive in nature, Mr. Nixon ignores *United States* v. *O'Brien,* 391 U.S. 367 (1968), where the Court—speaking through Chief Justice Warren who had authored *Brown* three years before—explicitly restated the principle that

> "In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, *punishment,* and lack of a judicial trial—are contained in the statute." 391 U.S. at 383 n.30 (emphasis added).

Mr. Nixon similarly ignores the Court's ruling that only the "clearest proof" of such a punitive character will suffice to void a statute as a bill of attainder.

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[58] *Accord: San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 39 (1973).

Flemming v. *Nestor,* 363 U.S. 603, 617 (1960). In the instant case, it is clear that both the purpose and effect of the Act at issue is the preservation of the record of the Nixon administration and not the punishment of Mr. Nixon. Mr. Nixon does not cite any evidence in the Act or its legislative history demonstrating that Congress was acting irrationally or out of malice. To be sure, Mr. Nixon quotes passages from the legislative history demonstrating that Congress was deeply concerned that the Nixon-Sampson agreement might forever frustrate a proper history of his administration. App. Brief at 132 n.60. But he ignores the fact that the result of this concern was not a punitive measure depriving him of liberty or property without justification or compensation, but rather a carefully limited response that respects his legitimate interests as far as possible consistent with the paramount government and public interests at stake.[59]

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[59] As "evidence" in support of his argument that he was singled out by Congress for special treatment, Mr. Nixon relies on the fact that when former Secretary of State Kissinger recently left office his legal adviser told him that he could claim some materials relating to government business as his personal property. Of course, these *post hoc* views of one individual have no bearing on the validity of Congress' action in 1974. In point of fact, on January 4, 1977, the Archivist of the United States asked to inspect the Kissinger papers to determine whether they were, in fact, "personal" in nature. *See* Letter from James Rhoads to Henry Kissinger, Jan. 4, 1977. And on February 3, 1977 the General Counsel of the General Services Administration rendered a comprehensive legal opinion challenging the analysis of the State Department's legal adviser and supporting the Archivist's position. *See* Memorandum from Donald Young to James Rhoads, dated Feb. 3, 1977. In any event, The Reporters Committee for Freedom of the Press, the American Historical Association, and the American Political Science Association are presently challenging Mr. Kissinger's action. *The Reporters Committee for Freedom of the Press, et al.* v. *Vance, et al.,* C.A. No. 77-0220 (D.D.C.), filed February 8, 1977.

Mr. Nixon generally ignores the fact that the Act guarantees him the right to inspect, copy and use all of the materials at issue. Section 102(c). Similarly, he belittles the Act's provision for just compensation, following a full judicial determination, for any reduction in his property rights (Section 105(c)) —a provision utterly at war with his characterization of a vindictive Congress bent on seizing his property without regard for his individual rights. Finally, Mr. Nixon ignores the provisions in the Act which insure the nondisclosure of his legitimate privileged communications, again with the benefit of full judicial review. Sections 104(a)(5), 104(a)(7), 105(a). Nevertheless, all of these provisions exist, and they demonstrate that the Act is a limited, nonpunitive, and completely proper response to the exigent situation created by Mr. Nixon himself.

B. The Act Is Not an Unlawful Invasion of Mr. Nixon's Privacy or an Unreasonable Search and Seizure.[60]

Relying on decisions from vastly different contexts, Mr. Nixon contends that the segregation by government archivists of the minute percentage of personal papers which he intermingled with the vast preponderance of government records preserved by the Act constitutes an invasion of his personal privacy and an unreasonable search and seizure. Mr. Nixon's arguments fail for a number of reasons.

First, Mr. Nixon's assertion that the Act was designed to seize and publicize his personal papers ignores

[60] The brief of appellees Lillian Hellman, *et al.* treats Mr. Nixon's privacy and search and seizure claims in greater detail. In this section we will merely emphasize some of the major infirmities in Mr. Nixon's position.

the fact that the statute directs that any such papers be returned to Mr. Nixon as soon as possible and in complete confidence. Section 104(a)(7). This Court should not countenance Mr. Nixon's litigation tactic of broadening the Act in order to raise constitutional problems which do not exist, particularly where a more narrow construction is in Mr. Nixon's own interest and the appellees (including the government agency which will administer the Act) concede that the statute should be construed more narrowly. As the Court has stated, the "task is not to destroy the Act . . . but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 571 (1973).[61]

Mr. Nixon is engaging in sheer speculation when he argues that the government may apply the Act to truly personal materials in a manner inconsistent with the Act itself. Moreover, the Act expressly provides for judicial review of any archival decision to retain or publicize any of the materials. Section 105(a). These procedures will provide ample protection for any legitimate privacy interest Mr. Nixon may have in any particular document. There is thus no need for the

[61] As noted above, the implementing regulations thus far proposed leave no doubt but that Mr. Nixon's personal papers will be returned to him. *See* Proposed Regulations, Sections 105-63.104(b), 401-5(a) (April 13, 1976) quoted at pp. 17-18 *supra.*

Mr. Nixon argues that the Act applies to all materials having historical or commemorative value, even if they are personal in nature. App. Brief at 33-34, 143. But Section 101 of the Act expressly limits its coverage to "*Presidential* historical materials" (*i.e.,* those relating to Mr. Nixon's presidential actions). There is no indication in the legislative history that Congress intended the statute to apply to family matters, doctor-patient consultations, and the like.

Court to ignore the clear intent of the Act and to rule on some hypothetical misapplication of its terms. *See Watson* v. *Buck,* 313 U.S. 387, 402 (1941); *Communist Party* v. *SACB,* 367 U.S. 1, 71-72 (1961).[62]

Second, Mr. Nixon's contention that segregation of his personal papers from the government records preserved by the Act is itself unconstitutional glosses over the fact that the archivists who will accomplish this task have "an unblemished record for discretion" and that such archivists have segregated the personal papers of all of our recent former Presidents. J.S. App. 45a, 83a, 408 F. Supp. at 347, 365. *See* Affidavit of Harry J. Middleton, App. 233-34; Affidavit of William R. Emerson, App. 254-55; Affidavit of John Stewart, App. 264. Indeed, Mr. Nixon ignores the fact that he had no doubt about the integrity and discretion of such government archivists when he provided for their review of his own vice-presidential papers. App. 267-68, 270, 274.

Third, the vast preponderance of the materials at issue are government records which Mr. Nixon neither

[62] The danger of such an advisory opinion is compounded by Mr. Nixon's selective use of the regulations which have thus far been proposed. For example, Mr. Nixon notes that the court below was troubled by the fact that the *initial* draft of the regulations did not provide for adequate notice to Mr. Nixon of archival decisions so that he might be able to assert his right to the full judicial review provided in the Act. App. Brief at 42. But Mr. Nixon fails to add that following the decision of the court below the proposed regulations were revised to provide Mr. Nixon and his heirs with just such notice. *See* Proposed Regulations, Section 105-63.401(c) (April 13, 1976).

Mr. Nixon's failure to mention this important addition to the regulations underscores the lack of merit in his position that this Court should speculate on the details of future public-access regulations which are not yet in final form, much less on the application of the proposed regulations to particular materials.

owned nor possessed. Of the estimated 42 million records, Mr. Nixon admitted that he saw no more than 200,000, and the overwhelming majority of these relate to government business rather than to Mr. Nixon's personal affairs. Clearly, nothing in the Constitution prohibits the government from retaining its own records. *See Wilson* v. *United States,* 221 U.S. 361, 380 (1911); *Davis* v. *United States,* 328 U.S. 582, 587-91 (1946).

This Court has never suggested that an elected official may conceal his conduct in office from public scrutiny on the grounds that it is his own "private" affair. To the contrary, the Court has held on a number of occasions that the actions of government officials should generally be open to the American people, who are "the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 495 (1975). *See also New York Times* v. *Sullivan,* 376 U.S. 254 (1964). Similarly, the Court has recently warned against applying privacy cases involving marriage, procreation and similar personal and family matters to other, far more public, contexts. *Paul* v. *Davis,* 424 U.S. 693, 712-13 (1976).

Fourth, the government did not "seize" anything from Mr. Nixon. The materials in question were simply left in the possession of the government when Mr. Nixon and his staff left office. This Court has held that the Fourth Amendment does not apply when the government finds itself in possession of property without any intrusion into a man's home or other zone of privacy. *See Burdeau* v. *McDowell,* 256 U.S. 465, 474-76 (1921); *Couch* v. *United States,* 409 U.S. 322, 331-32 n.14 (1973). *See also Meister* v. *Commissioner of Internal Revenue,* 504 F.2d 505, 508-11 (3d Cir. 1974),

cert. denied, 421 U.S. 964 (1975). There is thus no basis for the procedure demanded by Mr. Nixon, which would require shipment of 42 million government records to California followed by a "subpoena" for the production of the documents relating to governmental matters.

In sum, Mr. Nixon's arguments avoid the real issue which confronted Congress and President Ford in 1974 and which now confronts this Court: Given the fact that more than 99 percent of the materials at issue are government records relating to governmental matters, does the Fourth Amendment prohibit the government from reviewing those records on a confidential basis for the purpose of segregating a tiny fraction of personal documents for return to Mr. Nixon? Or, conversely, does the fact that Mr. Nixon intermingled his personal records in governmental files bootstrap him into a position where he can claim a constitutionally protected privacy right in—and exclusive control over—millions of government records relating to the Presidency? We submit that under the teaching of this Court that a congressional enactment—even in the Fourth Amendment context—is entitled to a "strong presumption of constitutionality . . . especially when it turns on what is 'reasonable,' "[63] the Act in question represents a proper resolution of the problem created by Mr. Nixon himself.

[63] *United States* v. *Watson,* 423 U.S. 411, 416 (1976) quoting *United States* v. *Di Re,* 332 U.S. 581, 585 (1948).

C. The Act Does Not Constitute a Violation of Mr. Nixon's First Amendment Rights.[64]

There is equally no merit in Mr. Nixon's contention that preservation of the records of his administration constitutes a violation of his First Amendment rights of speech and association. Again, Mr. Nixon's argument ignores the fact that the Act applies to official government records created or received by public officials in the exercise of their governmental duties. To be sure, many of the decisions recorded in these documents were in part the result of "political" considerations. But neither the First Amendment nor any decision of this Court permits elected officials to use—or misuse—their governmental authority free from public scrutiny merely because their actions are in part "political." *See United States Civil Service Comm'n* v. *National Ass'n of Letter Carriers,* 413 U.S. 548, 564 (1973); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968).[65]

The extravagant nature of Mr. Nixon's claims is manifest in his own definition of the "political" documents which, according to his theory of the First Amendment, are his to suppress or destroy as he alone sees fit. For example, he testified that, in his opinion, memoranda between presidential staff members suggesting the termination of government contracts for

[64] Since the brief of Lillian Hellman, *et al* discusses this issue in some detail, this section will merely emphasize some of the major infirmities in Mr. Nixon's position.

[65] It should be noted that Mr. Nixon argued to this Court in *United States* v. *Nixon,* 418 U.S. 683 (1974), that disclosure of the materials there would violate his First Amendment right of political expression. Brief for Respondent at 69-72. The Court did not even deem it necessary to respond to this contention in its opinion.

political reasons are "political" documents rather than government records. Nixon Dep. Tr. at 88-90, Ex. D, App. 576-77, 649. Mr. Nixon similarly stated that his decision to use the Central Intelligence Agency to interfere with the FBI's investigation of Watergate was "political" and "to an extent personal." Nixon Dep. Tr. 24-25, App. 522-23.

The records concerning abuses of power during the Nixon administration are not the only ones which would be subject to Mr. Nixon's exclusive control should this Court accept his First Amendment theories. According to the definition endorsed by Mr. Nixon, a document is "political"—and hence his personal property—if it relates to "public leadership" or "the marshalling of public and political support for the President's policies. . . ." Appellant's Juris. Statement at 26. Thus, a memorandum from a staff assistant to a member of the National Security Council concerning the deployment of strategic weapons would be protected by Mr. Nixon's First Amendment rights—and hence exempt from disclosure to succeeding Presidents—if it contained any suggestion that the President's decision on the issue should include a consideration of the "political" reaction of the American people or the need for "political" leadership by the President to secure public or congressional support.

Extending personal First Amendment protection to the records generated by public officials in the conduct of their duties would effectively shelter them from public accountability for the use of their governmental powers. Mr. Nixon's unprecedented theory—which has never been endorsed by this Court—would treat a

President's public office as a mere attribute of his private personality and would permit him to exclude his conduct in office from public scrutiny just as he might exclude his family life or religious views. Such a concept of the "political" activities protected by the First Amendment would also entitle other public officials and employees to claim that the public is prohibited from "prying" into the "political" manner in which they discharge their duties. The Federal Records Act and the Freedom of Information Act would be nullified, and we would return to a state of secrecy inimical to constitutional processes.[66]

Nothing in the First Amendment countenances such a result. To the contrary, the First Amendment was conceived in "the struggle . . . to establish and preserve the right of the English people to full information in respect to the doings and misdoings of their government." *Grosjean* v. *American Press Company*, 297 U.S. 233, 247 (1936).

Again, the Court need not embrace Mr. Nixon's extreme position in order to accommodate his legitimate First Amendment rights. To the extent that Mr. Nixon has intermingled personal political documents among the government records preserved by the Act, those materials will be returned to him pursuant to the Act. Again, the only burden on Mr. Nixon's First Amendment rights is that of the review of the materials by professional and discrete archivists which, as the court

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[66] As Patrick Henry stated:

"The liberties of the people never were . . . secure when the transactions of their rulers may be concealed from them." 3 Elliot 170.

below found, is "certainly not significant enough to outweigh countervailing government interests." J.S. App. 92a, 408 F. Supp. 369.

Finally, it must again be emphasized that any further burden on Mr. Nixon's First Amendment rights—such as the publication of a document dealing with his private political association—is pure speculation in light of the Act's express terms prohibiting such disclosures and guaranteeing full judicial review before any such public access is granted. Sections 104(a)(5), (a)(7), 105(a). There is thus no factual or legal foundation for Mr. Nixon's contentions that the necessary consequence of the Act at issue will be the improper dissemination of his private thoughts.

CONCLUSION

Mr. Nixon argues that this case arrives at this Court with the "distinct handicap" that "public passions are still high" concerning his conduct of his Presidency. Undoubtedly Mr. Nixon would prefer that the Court ignore the national trauma created by his actions in office and thus ignore the legitimate concern of Congress and President Ford over the suppression and possible destruction of the records of his administration.

It is not necessary for this Court to pass judgment on Mr. Nixon's Presidency. That judgment properly belongs to history and the American people. But that judgment will only properly be made if the materials at issue are preserved. For that reason alone, as well

as for all the other reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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RICHARD NIXON, *Appellant*

v.

ADMINISTRATOR OF GENERAL SERVICES, ET AL.,
Appellees

On Appeal from the United States District Court for the District of Columbia

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APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

The four briefs filed for the appellees differ in legal emphasis and in style, but they share certain critical misconceptions, on which the appellees have based much of their argument. Our Reply Brief is limited to a discussion of the most important of these erroneous assertions put forward in appellees' papers.

(1) The Proposition That The "Executive Branch" Is A Single Self-Contained Unit.

The Solicitor General's brief offers a short and simple reply to our separation-of-powers argument. The "autonomy of the Executive Branch" is not impaired by the Act, says the Solicitor General, because "the principle of separation of powers does not pre-

vent employees of the Executive Branch from screening materials created by the Executive Branch" (Gov. Br. at 23). Nor is any protected Presidential confidentiality breached by the Act, according to the Solicitor General, because "[t]he privilege for confidential communications does not bar access by the Executive Branch to papers and materials generated by the Executive Branch for the use of the Executive Branch" (Gov. Br. at 32).

The view that this case involves simply an intradepartmental dispute over "Executive Branch" records ignores reality. This case concerns not the documents of the "Executive Branch" at all, but the papers and recorded conversations of the individual who was, for five-and-one-half years, the Chief Executive of the nation. Yet the Solicitor General's brief studiously avoids reference to "the Presidency" or "the Office of the President"—which is, of course, the subject of this litigation, and which distinguishes this case from litigation involving other executive branch units.

The "Executive Branch" consists of thousands of federal employees ranging from the President of the United States to GS-1 clerks and part-time personnel. In this respect, it is not significantly different from the other two branches. The Legislative Branch consists not only of 100 Senators and 435 Representatives, but also of thousands of employees of the Members of Congress and legislative committees. And the Judicial Branch consists of the Chief Justice and Associate Justices of this Court, the judges of the courts of appeal and district courts, judges of other Article III courts, and thousands of judicial employees, including law clerks, bailiffs, and secretaries.

Would the Solicitor General speak as sanguinely of the preserved "autonomy" of the Judicial Branch if Congress decided that all the papers belonging to former Chief Justice Warren were to be reviewed, for ultimate public access, by a senior United States Magistrate in Iowa or Alabama, to be assisted by selected law clerks of senior district judges in other jurisdictions? Would the Legislative Branch's "autonomy" be equally secure if a chief minority counsel of some standing committee and his subordinates were given the statutory task of reviewing all the papers of former House Speaker Carl Albert?

In either of these hypothetical situations,[1] the independent operation of the particular branch would be jeopardized by the intrusion of otherwise unauthorized and unknown individuals into communications that had been presumed confidential. It makes no difference whether the unauthorized individuals are within the same branch of government or outside it. No President of the United States has ever supposed that every conversation in which he engages or every memorandum that crosses his desk becomes immediately available to all employees of the "Executive Branch." Quite the contrary, government simply could not function if such free disclosure within the "Executive Branch" were the rule.

Our argument that the separation-of-powers principle is violated by an Act such as this one does not

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[1] A subcommittee of the National Study Commission of Records and Documents of Federal Officials has proposed that non-private judicial papers become the property of the United States. National Study Commission on Records and Documents of Federal Officials, Subcommittee Proposal, March 7, 1977.

turn, therefore, on the technical question whether Mr. Nixon's documents and tapes will be reviewed by "Executive Branch" employees or by "Legislative Branch" or "Judicial Branch" employees. It turns, rather, on whether Congress can be permitted to impose its judgments upon the internal workings of the Office of the Presidency by subjecting the most confidential of its papers to the close scrutiny of individuals whom the President has not approved. The President is given "the executive power" by Article II of the Constitution, and it infringes that power to have materials that were created in or for the Office of the President screened by anyone *against the wishes of the President in whose administration they were generated,* whether the "screener" be an employee of the executive branch or otherwise.[2]

(2) The Proposition That The Appellant Would Be In The Same Position If President Ford Had Refused To Turn Over The Documents And Tapes.

The Solicitor General analogizes Mr. Nixon's situation to the position he would have occupied if, after his resignation, Mr. Ford had refused to surrender physical possession of the materials to him (Gov. Br. at 24). Although we believe that in those circumstances there would have been substantial alternative bases for Mr. Nixon to claim the materials and to protect their confidentiality (and Mr. Ford's Attorney General apparently agreed with this view), the

[2] The Solicitor General recognizes a flaw in his executive branch approach in that the review panel designated by the proposed regulations to screen Mr. Nixon's tapes and papers will consist of two nonexecutive branch personnel (Gov. Br. at 25 n.10). The Solicitor General dismisses this problem by noting that none of the proposed regulations is at issue in this case.

separation-of-powers aspect of this claim undoubtedly would have been less troubling.

This case, however, does not involve a deliberate decision by a successor President to withhold custody of his predecessor's materials while the new President, or someone he selects, reviews the materials. It concerns, rather, a deliberate decision by Congress to intrude into the operations of the Presidency. The Act removes all discretion from the new President and assigns exclusively to a subordinate executive branch official the task of reviewing a former President's personal recorded conversations and files. Moreover, Congress has kept its hand in the implementation of the Act by requiring the "Executive Branch official" to return to Congress for approval of the regulations he drafts in carrying out his statutory task, a provision even the Solicitor General will not defend here (Gov. Br. at 26 n.11). In fact, the incumbent President has no authority whatever to review the judgment of the Executive Branch official who implements the Act. He—like Mr. Nixon—must sue to prevent disclosures. This case, therefore, hardly resembles the Solicitor General's description of it as one in which Congress has acted simply, "to preserve the Executive Branch's access to executive papers and materials . . ." (Gov. Br. at 25).[3]

[3] Related to the misconception described above is the Solicitor General's disingenuous assertion that the challenged statute is one "*allowing* officials of the Executive Branch to take custody of and examine certain materials generated by the Executive Branch . . ." (Gov. Br. at 11; emphasis added). The Act does not, of course, merely "allow" anything to happen; it *directs* that the Administrator of General Services "*shall* receive, retain, or make reasonable efforts to obtain" the materials to which the Act applies.

The question is *not* whether the Executive Branch will "have access to any of the materials, for any purpose" (Gov. Br. at 16). It is, rather, whether Congress may *compel* the Executive Branch, in a successor administration, to scrutinize and transcribe *all* the President's materials for whatever purposes it thinks sufficient. The separation-of-powers principle is violated in these circumstances because the question of access to Presidential materials necessary for "the business of government" has not been left, as it always previously has been, to arrangements between Presidents. Instead, Congress has arrogated to itself the right to make the rules, and the effect of those rules is to force disclosure of presumptively confidential deliberations of a President.

(3) The Proposition That A President's Constitutional Powers May Be Restricted By The Policies Of A Predecessor Or Successor.

Both the Solicitor General and the private appellees contend that Mr. Ford's approval of this Act and the Justice Department's defense of it during the Carter Administration refute the separation-of-powers argument. These acts, it is said, prove that the Executive Branch favors this legislation and does not view it as an undue interference with Executive functions. Even if we assume that these actions constitute considered Presidential judgments, they do not affect our claim.

The constitutional principles relating to separation of powers cannot be permanently waived by the action or inaction of a particular constitutional officeholder at a particular time. The *Steel Seizure Case* and the many years of litigation concerning the 1867

Tenure of Office Act (discussed at pages 104-105 and 64-66 of our original brief) prove this point. In the *Steel Seizure Case,* Congress acquiesced in President Truman's action and even refused his invitation to take steps to overrule it; nonetheless, this Court held that Congress' legislative prerogative had been infringed. And various Presidents who occupied the Office of Chief Executive during the sixty-year period between the enactment of the Tenure of Office Act and the decision in *Myers* v. *United States,* 272 U.S. 52 (1926), apparently followed the Act's procedures. Yet such acquiescence did not prevent this Court from declaring the 1867 law to be a violation of the separation-of-powers principle.

A rule that would bind one President to policy decisions regarding internal operations of a predecessor or successor would wreak havoc with the Presidency. It is common knowledge, for example, that President Carter initially announced his intention to throw open Cabinet meetings to representatives of the media. He soon abandoned this idea because it inhibited the free flow of candid communication. Could he constitutionally have prescribed an "open meeting" rule for all future Presidents? Or, on a subject touching so intimately on the work-habits of a Chief Executive, could he have urged Congress to enact a law requiring that *all* Cabinet meetings henceforth be held in public notwithstanding the discerned needs of future Presidents? Or could Congress have placed the discretion in the Administrator of General Services to decide which Cabinet meetings should be opened? We submit that each President must be permitted to set his own rules on subjects so closely related to the implementation of the "executive power" conferred by the Constitution.

Even if President Ford's decision to sign the legislation and President Carter's failure to voice opposition to it constitute some evidence that they disagree with former President Nixon's assessment of the impact of the Act upon the operations of the Presidency, their reactions must be judged in light of the special circumstances facing them. First, President Ford would have encountered obvious difficulties if he had vetoed this legislation, after having been sharply attacked for issuing a pardon, and President Carter would doubtless be roundly criticized for speaking against the Act, after having campaigned for "open government." Second, this Act deals only with Mr. Nixon's materials. Even on the unlikely chance that such indiscriminate legislation will be enacted with respect to the materials of later Presidents, as contrasted to the watered-down versions being suggested by the Title II Commission, they might still be able to structure their files so that an act having only prospective application would not prove detrimental to their interests.[4] Third, and most important, the Ford and Carter views jointly represent little more than two-and-a-half years of experience in the presidential office. Weighed against these views are those of earlier Presidents such as Johnson, Eisenhower, Truman and Hoover, all of whom imposed significant limitations upon access to materials they considered to be confidential. Indeed, President Ford has already demonstrated his concern about unwarranted disclo-

[4] This factor is particularly relevant with respect to what the Reporters Committee calls President Ford's "voluntary compliance" with the terms of the Act (Rep. Comm. Br. 37). President Ford's staff members maintained their files for two years in light of the possibility that similar legislation might be enacted.

sure of confidential materials by imposing a fourteen year access restriction on a variety of his papers, including all items containing confidential communications with his advisers during his tenure as a member of Congress, as Vice President and as President.

(4) The Proposition That This Case Presents Largely Hypothetical Issues.

Reiterating the position they advanced in their motions to affirm, the appellees urge this Court to refrain from deciding issues "based upon hypothetical possibilities" (Gov. Br. at 14). The appellees contend that this appeal is premature because the "public access regulations" governing public disclosure of the appellant's materials have not yet been implemented. As we noted in our initial brief, however, the Act has a variety of immediate and concrete effects on Mr. Nixon's rights, including the following:

(a) The Act unilaterally abrogates a contract entered into by the government which, if specifically performed, would guarantee appellant various rights with respect to these materials.

(b) The Act directs a group of government archivists, lawyers, and stenographers to review, categorize and analyze every recorded word spoken by the appellant and those who talked with him during a two-and-a-half year period.

(c) An official, appointed by a Democratic President and confirmed by a Democratic-controlled Senate has been delegated the discretion to determine which political files of a Republican President will be disclosed to the general public; and

(d) Executive branch-wide access to the appellant's White House files has been authorized for any "lawful Government use."

None of these effects of the Act depends in any way upon the content of the public access regulations. Moreover, regardless of what those regulations may provide, the issues of whether the appellant has been subjected to a bill of attainder, and whether government review of his conversations and files violates his rights of privacy and free speech are squarely and immediately presented by the Act itself.

Beyond these immediate consequences is the probability—recognized as not more than a possibility by the Solicitor General—that reserving these questions for future resolution would doom Mr. Nixon to the status of a "continual litigant" (Gov. Br. at 44 n. 29). We noted in our original brief that this is not a case in which many individuals may be expected to shoulder the burden of future litigation; there is one person, and one person only, who will be forced to bear the burden of lawsuit after lawsuit. It is simply wasteful and unjust to relegate him to this status in the fond hope that the constitutional infirmities that infect the Act will somehow be cured by the promulgation of restrictive public access regulations.

(5) The Proposition That Presidential Access For "Current Government Business" Justifies This Act.

Although Congress enacted this legislation amid much discussion of the historical interest in the record of the Nixon Presidency, there is at this stage almost no mention of that subject in the Solicitor General's brief or in those of the private appellees.

The likely reason for the omission is not hard to draw: Whatever historical interest there may be in the papers reflecting the internal operations of a President's office is present, to at least the same degree, in the papers reflecting the internal operations of this Court. The same rationale that sustains this Act would thus require that a similar seizure of judicial documents by legislative enactment also be upheld.

In resisting this "judicial analogy" the Solicitor General argues that the Presidency is different from this Court because "information and lessons" gained from the experience of one President are needed in succeeding administrations (Gov. Br. at 27-28 n. 12). Viewing the Act in this light, the Solicitor General contends that the Court need only decide "whether Executive Branch employees may have access to papers and other materials accumulated during appellant's terms of office, either to screen the papers and materials for the purposes set forth in the Act or *to use them to the extent necessary in carrying out their executive responsibilities*" (Gov. Br. at 24-25, emphasis added).

This argument loses its force, however, in light of facts in the record showing that the "need" for Presidential materials is largely illusory:

(1) In the nearly three years since Mr. Nixon resigned, there has never been an occasion for the Executive Branch to request access to his tape recordings for "current government business."

(2) The Special Prosecutor's need for investigative materials has been satisfied without invoking the Act at all.

(3) There was no evidence submitted to Congress that this Act was needed to facilitate the current business needs of the Executive Branch.

(4) The only instance cited by the government to the district court relating to the new administration's need for access pertained to one file room of Mr. Nixon's National Security Council files.

(5) President Ford's deposit of his presidential materials authorizes access for "current government business" only to the incumbent President, his Counsel, or such other White House personnel as are specifically designated by the President's' Counsel.[5] Executive Branch-wide access, in accordance with the Solicitor General's view, has been prohibited by President Ford.

Much as the appellees belabor the few incidents in our history when Presidents were obliged to secure from their predecessors copies of documents that were needed for "ongoing government business," they simply cannot make this Act fit the narrow scope of that need. Instead, the Act sweeps up *all* Presidential materials, not just those likely to be needed by subsequent administrations, and it makes those materials available to any Executive Branch officers, not just to the Office of the President. Plainly, the "ongoing government need" hypothesis is *post-hoc* rationalization that ill describes the Act it is meant to justify.

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[5] With this restriction go the further requirements that the request must be in writing from the President's Counsel with a copy to President Ford or his agent; that it must describe with specificity the material required; that it must state that the information is unavailable from any other source; and that it must include a commitment to return all copies when they are no longer needed.

(6) The Proposition That Only Incumbent Presidents May Claim Presidential Privilege.

The private appellees continue to press their argument that a former President has no standing to resist disclosure of his private deliberations while in office, or that, at minimum, his claim is entitled to little weight. Significantly, they choose not to discuss the instance in which President Truman, after leaving office, was forced to invoke the separation-of-powers principle on his own behalf to preclude a politically motivated inquiry by a hostile Congress into his conduct as President. Under the private appellees' theory, Mr. Truman would have had no choice but to submit, unless his successor decided to shield him. The theory is erroneous, as the Solicitor General acknowledges.

The private appellees apparently do recognize that there is a distinction between a privilege based upon a relationship of confidentiality and a privilege—such as the one involved in *United States* v. *Reynolds,* 345 U.S. 1 (1953)—which rests upon the secret nature of the information that would be disclosed (Rep. Comm. Br. 28-29). Their principal argument against recognition of a privilege of confidentiality is that certain documents—such as a confidential memorandum to the President from the Joint Chiefs of Staff—might be subject to *both* privileges. But it is common in the law that a single document or communication might be protected by separate testimonial privileges, and that even if one privilege is waived, the other remains. Consequently, if a successor President determines that a memorandum from the Joint Chiefs of Staff to his predecessor need no longer be kept secret because its subject is no longer sensitive, the earlier President may still feel that the confidential nature of the com-

munication warrants continued protection. That independent interest is precisely what was recognized in this Court's opinion in *United States* v. *Nixon,* 418 U.S. 683 (1974), and it applies here.

Nor is that interest diminished, as the Solicitor General suggests, if it is Executive Branch personnel in a succeeding administration who want access. The argument that former Presidents have no protection against intrusions by subsequent executive branch officials necessarily disregards both tradition and the logic of the privilege. New Presidents and their staffs have never had *carte blanche* access to the confidential files of their predecessors. Nor have they needed it. To this day, for example, tape recordings of conversations of Presidents Kennedy and Johnson remain restricted from *all* access by the Executive Branch.

Similarly, except within narrow, well-defined areas, a successor administration has no greater or more legitimate interest in the confidential materials of a prior administration than does the public generally. For example, there is no justification for the incumbent Carter Administration to have access to former President Ford's internal political staff discussions concerning his choice of Robert Dole for a running mate. But on the logic of the Solicitor General's present position, President Ford would have no alternative but to permit such access to any Executive Branch employee who desires it. To be sure, in the area of foreign relations and national security, disclosure might ordinarily be warranted, and for that reason Mr. Nixon has never objected to providing access to the National Security Council files if the incumbent President decides it is needed. In other areas, however, the same principles of confidentiality that bar disclosure of materials to the public generally, protect them from disclosure to future administrations.

(7) The Proposition That The Privacy Argument Is Premature And That The Archivists Are "Discreet."

The principal argument made by the appellees on the invasion-of-privacy issue is that Mr. Nixon should wait to see how the Act is administered by the Executive Branch officials before charging that it invades his privacy. The grounds invoked by the district court to sustain the constitutionality of the Act against Fourth Amendment claims are expressly repudiated by one set of appellees (ACLU Br. at 15) and discretely unmentioned by the others.

After all this well-meaning advice that he wait for some future salvation and repeated exhortations that his claims are premature, Mr. Nixon is left with the following immediate prospect: Absent this Court's intervention, all his personal papers and recordings of two-and-a-half years of conversations in his office and on various residence telephones will be subjected to meticulous scrutiny (see the charts at pp. 36-37 of our original brief) by a band of "archivists" whom he has no reason to know or trust. The "archivists" are not his employees and owe no loyalty to him; they are government officials employed by the National Archives, which is seeking to become an independent agency with no executive branch tie to support the Solicitor General's separation-of-powers argument.

On the ground that the archivists have an "unblemished" record, the appellees argue that the invasion of privacy involved in their review is permis-

sible.[6] But this argument overlooks the fact that the archivists are government employees subject to the direction of a government official who has gone on record as favoring broad public dissemination of the papers of high-ranking officials. Moreover, the same group of archivists—whose disinterest is essential to the appellees' position—have volunteered their services to Warner Communications, Inc., and the three major networks as part of the proposed plan to make commercial reproductions of those Presidential tapes that have been played in open court. See *Nixon* v. *Warner Communications, Inc.*, No. 76-944, cert. granted, March 28, 1977. Just as it is not remotely conceivable that an otherwise unconstitutional wiretap or other electronic surveillance might be upheld simply because the government employees doing the job were "professional and discreet," the intrusion accomplished by this Act must similarly be invalidated.

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[6] The Solicitor General quotes from the testimony of Dr. Herman Kahn to prove that the archivists have protected confidentiality in the past (Gov. Br. at 52 n. 35). In fact, the quoted material proves only that they secured the papers of outgoing Presidents against anyone "lay[ing] hands on them who might do them harm"—not that confidences were protected.

There is no evidence in the record here to sustain the district court's conclusions concerning the disinterest of the archivists. That factual issue was not raised by the pleadings below. It appeared as an argument in the appellees' briefs and was accepted as fact by the district court. In light of the silence of the record in this regard, appellant requested an evidentiary hearing on the question of archivist bias. The district court denied that request. Order of March 25, 1976, denying Plaintiff's Motion to Protect the Status Quo Pending Appeal.

(8) The Proposition That The Act Raises No Fourth Amendment Problems.

The Solicitor General contends that because the appellant's materials are in the "lawful possession of the United States," a complete search of those materials does not violate the Fourth Amendment (Gov. Br. at 52-53). Yet both the factual premise and the legal argument on this point are erroneous. Mr. Nixon left the White House with directions to forward his materials to San Clemente. When the Special Prosecutor requested that the documents temporarily remain in the White House, the appellant entered into a contract with the government that covered custody, control and disposition of the materials. This contract was unilaterally abrogated by the Act, which directed the General Services Administration to seize the tapes "[n]otwithstanding any other law or any agreement or understanding." Section 101(a), (b)(i). Because the appellant's right to possession of the materials was frustrated by the very Act challenged here, we take strong issue with the Solicitor General's assertion that the government's possession is lawful.

Even if the government's present custody of the materials is somehow considered "lawful," however, the fact that the appellant does not have custody of the materials does nothing to destroy his reasonable expectation of privacy with respect to those materials. If the Solicitor General is correct that property in the hands of government officials on government premises may be searched without implicating the Fourth Amendment, then the government could freely search all first-class mail without running afoul of the Fourth Amendment, a contention that this Court

rejected almost a century ago. *In re Jackson,* 96 U.S. 727 (1878).

The district court expressly held that the appellant enjoyed a reasonable expectation of privacy in the confidential materials at issue in this case, a holding that renders inapplicable the discussion in *Couch* v. *United States,* 409 U.S. 322, 335-36 (1973). Moreover, the Solicitor General's reliance on *Andresen* v. *Maryland,* 427 U.S. 463 (1976), ignores the fact that a valid search warrant was issued in that case, describing with particularity evidence relevant to the commission of a crime. Indeed, the Court's description in that case of an unconstitutional general warrant as a "general, exploratory rummaging in a person's belongings" would fit very well the wholesale seizure of materials effected by the present Act. Finally, the suggestion that the search authorized by the Act is analogous to a permissible "inventory search" is disingenuous in the extreme. Warrantless inventory searches have been held valid only in narrow circumstances, see *South Dakota* v. *Opperman,* 96 S. Ct. 3092 (1976), and the processing, review and ultimate disclosure contemplated by this Act far exceeds what could fairly be deemed a search conducted for proper "inventory" purposes.[7]

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[7] The Solicitor General's further contention that there is an exception to the general principles of the Fourth Amendment for searches of papers and other materials of public officials is reminiscent of his similar argument earlier this term that there is a broad exception to the Fourth Amendment that allows warrantless intrusions into privacy to facilitate the enforcement of the tax laws. *G.M. Leasing Corp.* v. *United States,* 97 S.Ct. 619, 629 (1977). The Court flatly rejected that effort to create a novel "exception" to the Fourth Amendment, and it should do the same here.

(9) Miscellaneous Misreadings Of The Act And Of Appellant's Arguments.

In a variety of ways, the appellees have attempted to ease their task of defending the Act by simply misreading it. For example, the Solicitor General states, "Under the Act, appellant receives, on request, a copy of any of the materials that have been impounded" (Gov. Br. at 14). There is no such provision in the Act. The district court evidently thought such a right would be a good idea, and the court temporarily created it in its injunction pending appeal. But that right will vanish with the dissolution of the district court's injunction, a fact that the Solicitor General has failed to mention.

The Solicitor General asserts that section 104(a)(5) of the Act *guarantees* appellant all of his privileges" (Gov. Br. at 16, emphasis added). The actual language of the Act, however, is that the Administrator shall promulgate public access regulations that "shall take into account [among six other factors] . . . the need to protect any party's *opportunity* to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials." Section 104(a) (emphasis added). This provision shifts to appellant the burden of contesting any decision concerning public disclosure with which he disagrees.

Finally, the Solicitor General states that ". . . the Act, on its face, provides for the return of private materials to appellant." The Act, in fact, has no such provision. With respect to the appellant's private materials, the Act provides only that the public access regulations "shall take into account the need to give

to Richard M. Nixon, or his heirs, tape recordings and other materials which are not likely to be related to the need [to provide the public with the full truth . . . of Watergate] and are not otherwise of general historical significance." Section 104(a)(7) (emphasis added).

In like fashion, in their effort to refute various arguments we have advanced, the appellees have mischaracterized our position on several important issues. For example, the Solicitor General contends that our argument is similar to those that were advanced and rejected in *United States* v. *Nixon,* 418 U.S. 683 (1973). Quite the contrary, we have argued that this Court's decision in *United States* v. *Nixon* provides the most compelling basis for invalidating the Act. There, this Court determined that in order to rebut the presumption of confidentiality afforded a President's deliberations, the party seeking disclosure must make a preliminary showing of compelling need for specific materials or communications. Here, Congress has enacted legislation that authorizes the Administrator and his staff to review the entirety of a President's files and two-and-a-half years of his recorded conversations, with no preliminary showing of compelling need as to any specific items.

The Solicitor General further characterizes our position as suggesting that appellant is to be "the only judge" with respect to claims of privacy or privilege. That is not so. Instead, we have argued that if there is justification for a specific intrusion into presidential confidentiality, the lawful mechanism is to issue a subpoena for production of particular materials. If the interests requiring disclosure are shown to be sufficient to the satisfaction of the court, dis-

closure is permissible, even over a claim of privilege. But the proper procedure is not to enact sweeping legislation seizing all of the appellant's papers and effects over a five-and-a-half year period on the ground that some of those materials may be needed at some time by some persons in some future administration.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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MOTION FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

v.

ADMINISTRATOR OF GENERAL SERVICES, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF PUBLIC AFFAIRS ASSOCIATES, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Public Affairs Associates, Inc., hereby moves for leave to file the attached brief as *amicus curiae.*

Public Affairs Associates is an educational publishing corporation which specializes in publications related to current events, including publications based on government prepared materials. Amicus was the plaintiff in *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111 (1962), which is relied on by counsel for the parties in this action.

The annexed brief is intended by *amicus* to provide the Court with additional material on the question which underlies this appeal but which has not been adequately briefed by the parties—who *owns* the papers, documents

and other records generated within or received by the office of the President. That issue was the subject of a detailed and well reasoned opinion by the District Court at an earlier stage of this litigation, *Nixon* v. *Sampson,* 389 F.Supp. 107 (D.D.C. 1975), which concluded that the records, etc., at issue in this case were and always had been the property of the United States. Notwithstanding Rules 15(1)(a) and (h) and 40(1)(a), appellants did not mention the existence of this opinion in either their Jurisdictional Statement* or Brief, or reproduce it in their Jurisdictional Statement. The government's brief refers to the existence of "an opinion" at 389 F.Supp. 107, but does not discuss its nature or relevance. Brief for the Federal Appellees, p. 10.

Appellant asserts that he owns some 42,000,000 documents and tapes, and that he therefore should be free to destroy, alter, or sell them on the open market. Although Judge Richey, below, concluded that these materials belonged to the United States, the Solicitor has declined to assert that the government owns the records or to discuss the matter at all. We do not contend that the Solicitor General's silence on this issue is in any way improper. On the contrary, we note that the Department of Justice also declined an express invitation to take a position as to whether the government owned the materials at issue in *Public Affairs Associates* v. *Rickover*, 369 U.S. 111, 113 (1962).

A decision that the disputed records are the property of the United States will, for the reasons set out in our brief, be dispositive of the issues presented by this appeal. If this appeal is affirmed on the more complex grounds

* The Jurisdictional Statement noted that the original agreement between appellant and the Administrator was reproduced at 389 F. Supp. at 160-62. P. 6, n. 2.

suggested by the Solicitor General, it will be but a prelude to a new round of litigation between Mr. Nixon and the General Services Administration regarding assertions of privilege and claims for monetary compensation; a decision on the question of ownership will pretermit most such litigation and issues. More importantly, such a decision will bring to an end the surreptitious conversion of government property by public officials at all levels. Although the practices of outgoing Presidents and other federal employees has varied widely over the years, permanent employees of the executive branch have been uniformly unwilling to protect the government files from such pillage. In most cases the permanent employees aware of the proposed removal of federal documents are subordinates of the officials taking the materials, and are naturally reluctant, as are colleagues who may wish to engage in similar practices, to assert that the materials are government property. Private parties not unwilling to make such an assertion may lack the requisite standing. This is one of the few circumstances in which the question of ownership of presidential and other official papers is squarely presented, and it should now be decided.

We are not insensitive to the fact that a decision on ownership will, to some extent, touch on the practices of past and present members of this Court. Were there other circumstances in which the issue could be decided without that complication, it might be wise to defer decision until such a case arose, but any case presenting the issue of ownership will have simliar ramifications. There is no alternative judicial forum in which this difficulty will not exist. Compare *Laird* v. *Tatum,* 409 U.S. 824, 837-38 (1972) (Rehnquist, *J.*).

This Court has in recent years adopted a salutary practice of requiring that a motion for leave to file a brief

was $200,000 a year. 3 U.S.C. § 102. The Emolument Clause would clearly be violated if a President were permitted to augment his statutory salary by seizing title to any number of "presidential documents", whose creation, assemblage, number and dollar value were largely controlled by the President himself.

The conduct of past Presidents does not, we believe, support appellant's claim of ownership. Past Presidents have frequently insisted publicly that officially generated papers were government property. In 1782 Reverend William Gordon, then at work on a history of the nation's origin, wrote to General Washington seeking access to the latter's Revolutionary War records. Washington declined to make the records available on the ground that they were public property and only Congress could open them for private use.

> "[T]he Papers of the Commander-in-Chief . . . I consider as a species of Public property, sacred in my hands . . . . When Congress then shall open their registers, and say it is proper for the Servants of the public to do so, it will give me much pleasure to afford all the Aid to your labors and laudable undertaking which my papers can give; 'til one of those periods arrive I do not think myself justified in suffering an inspection of, and any extracts to be taken from my Records." [3]

President Roosevelt in 1941 described the White House papers as "the people's record" and announced that they would be placed, on the completion of his presidency, in

[3] J.C. Fitzpatrick, The Writings of George Washington from The Original Manuscript Sources, v.25, pp. 288-89 (1931-40). In 1783 Washington again wrote Gordon assuring him that "All my Records and Papers shall be unfolded" when "the Sovereign Power" authorizes it. Id., v. 27, p. 52.

a government authorized library in Hyde Park.[3] Roosevelt's written instructions contemplated that the library and its contents would become part of the National Archives, which is what occurred. In 1947 the *Christian Science Monitor* described the views of President Truman on this subject:

> President Truman plans to set a precedent for Presidents. He will not, repeat not, take with him his state papers when he leaves the White House. . . . The President feels strongly about this; he has for a long time. The public papers of any top official, from the President on down, should remain the property of the government, he holds.[4]

On September 16, 1974, President Ford announced a similar position regarding the papers of his presidency:

> As far as I am personally concerned, I can see a legitimate reason for Presidential papers remaining the property of the government. . . . In my own case, I made a decision some years ago to turn over all of my Congressional papers, all of my Vice Presidential papers to the University of Michigan archives. As far as I am concerned, whether they go to the archives for use or whether they stay in the possession of the government, I don't think it makes too much difference. I have no desire personally to retain whatever papers come out of my administration." [5]

[3] The Public Papers and Addresses of Franklin D. Roosevelt, p. 630 (1941); H.G. Jones, The Records of a Nation, 157, 162 n. 25 (1969).

[4] January 29, 1947.

[5] Weekly Compilation of Presidential Documents, September 23, 1974, p. 1160.

The actions of past Presidents are more varied, and their precedential significance obscured by the lack of records of what occurred and why, and by the absence of an officially designated depository for the systematic retention and preservation of presidential documents. After leaving the Presidency, for example, George Washington wrote to the Secretary of the Treasury about the need of facilities "for the security of my Papers of a public nature" and engaged in correspondence with the Secretary of War regarding suitable "accommodation and security of my Military, Civil and private Papers". Since provisions for official storage were never made, and Washington had no choice but to leave them in the custody of his heirs.[6] President Jefferson "deposited in the various departmental offices—State, Treasury, War, Justice, and Post Office—every document having any relation to the conduct of public business or being in any sense official in nature",[7] but owing to the informal practices of the era many of these documents were later acquired by private collectors. Thereafter, in the continuing absence of any specifically designated depository, some Presidents left official documents in the possession of whichever department they thought most likely to preserve them,[8] while others took with them some documents the number and nature of which is not known. Beginning about 1905, when the Library of Congress intensified its interest in assembling and preserving presidential papers, large numbers of such documents were deposited with the Library by former Presidents Theodore Roosevelt, Taft and Coolidge and the heirs of Presidents

[6] J.C. Fitzpatrick, The Writings of George Washington from the Original Manuscript Sources, v. 27, p. 155, v. 32, pp. 15, 41, v. 35, pp. 430-31 (1931-40).

[7] *Nixon* v. *Sampson*, 389 F.Supp. 107, 141 (D.D.C. 1975).

[8] See Exhibit AA, p. v; Exhibit BB, p. vii.

Van Buren, William Henry Harrison, Polk, Lincoln, Grant, Garfield, Cleveland, Benjamin Harrison, McKinley, and Wilson.[9] Since the adoption of the National Archives Act in 1934 every former President has placed such records as he removed from the White House in an officially designated library maintained by the National Archives and Records Service. These varying practices suggest, not a uniform assumption that a former President owned whatever materials he could physically remove from the White House, but differing efforts to find suitable depositories for documents recognized to be public in nature.

Even if the record revealed a pattern of Presidents acting as if they owned such papers, selling or copyrighting them for financial gain, that would not constitute the sort of practice deserving of precedential significance, for the instances of such conduct have been essentially surreptitious in nature. The public was not in the past aware whether, and even now the parties are in dispute as to the extent to which, former Presidents have been treating officially generated papers as their private property. The practice of some public officials of donating public papers back to the government, or to other institutions, in return for a tax deduction caused a public scandal of major proportion when it was first exposed in 1969 by the *Wall Street Journal*.[10] Both the Library of Congress, the recipient of these "donations", and over a dozen alleged donors refused to disclose whether or which federal officials had engaged in such a practice. Appellant never publicly disclosed that he had used his Vice-Presidential papers in this manner, and the country only learned of it through a story in the *Providence Journal* on October 3, 1973. The Treasury De-

[9] Hearing on Presidential Libraries by a Special Subcommittee of the House Committee on Government Operations, 84th Cong., 1st Ses., pp. 39-44 (1955).

[10] May 22, 1969; 115 Cong. Rec. 20462-63 (1969).

partment employee responsible for that disclosure was dismissed; the use of those papers to pay virtually no income taxes in 1970 and 1971 was a subject of the subsequent House impeachment inquiry, led to criminal convictions of an appraiser and attorney involved, was subsequently disapproved as inconsistent with the Internal Revenue Code by the Treasury Department. Practices of the sort which have survived only when hidden from the scrutiny of public opinion are not the "deeply embedded traditional ways of conducting government" to be relied on in construing the Constitution. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 611 (1952).

As Judge Richey noted below, *Folsom* v. *Marsh*, 9 Fed. Cas. No. 4,901 (C.C.D. Mass. 1841), expressly noted that any rights of a former President to papers prepared or received by him were subservient to the rights and interests of the government, and *Folsom* thus supports the constitutionality of the Presidential Recordings and Materials Preservation Act. 389 F.Supp. at 139-140. Insofar as Justice Story's opinion in *Folsom* concludes that a former President has a fungible property right, as against other individuals, in such papers, we believe Justice Story's personal interest and involvement in the publication at issue in *Folsom* was so substantial as to vitiate any precedential significance of that decision.

Folsom concerned the validity of a copyright of a multivolume collection of George Washington's presidential and other papers, edited by Jared Sparks and published by Charles Folsom. In 1826 Sparks approached Justice Bushrod Washington, the former President's nephew who was in possession of many of the latter's letters, etc., and sought his cooperation in assembling the proposed collection. In soliciting Justice Washington's cooperation, Sparks turned for aid to Justice Story, whom he had known since the

early 1820's. In a letter of January 16, 1826, about his plans for the project, Sparks advised Justice Washington "For further information as to my purposes and qualifications, permit me . . . to refer you to Judge Story, with whom I have conversed on this subject, and who manifests a lively interest in the plan of collecting into one body all the writings of General Washington".[11] On January 20, 1826, Justice Story wrote to Sparks:

> I think your project of collecting the works of Washington a noble project and deserving of universal encouragement. I know not into whose hands the task could better have fallen. Your letter to Judge Washington is excellent both in matter and manner, and develops your plan in such a way as cannot but command approbation.[12]

On January 26, 1826, Sparks wrote a second letter, this one to Justice Washington and Chief Justice Marshall, which Story delivered on Sparks' behalf.[13] On February 23, 1826, Justice Story reported to Sparks with regret that "Judge Washington does not incline to favor your project." [14]

When Washington remained unresponsive, Sparks again took up the matter with Justice Story, advising him of his determination to proceed anyway, explaining in a letter of March 4, 1826, that the publication might still be possible without Bushrod Washington's aid. "All the important materials may be obtained from other quarters, though

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[11] H.B. Adams, The Life and Writings of Jared Sparks, v. I, p. 401 (1893).

[12] *Id.*, pp. 401-02.

[13] See *id.*, pp. 404, 405.

[14] *Id.*, pp. 402-03.

with great trouble. Washington's public letters and papers are the property of the nation." [15] After assembling a massive number of these papers, largely from official files, Sparks again wrote to Justice Washington, threatening to publish without his aid, but promising a share of the profits if he were granted access to the documents in Justice Washington's possession.[16] Eventually Sparks was permitted to use these materials in return for an agreement that the resulting profits were to be divided evenly between Sparks, Justice Washington, and Chief Justice Marshall.[17]

Justice Story was substantially involved thereafter in the commercial aspects of the publication of President Washington's papers. On June 1, 1827 he wrote to Sparks of his support for the project and suggested another source of profit. "What do you mean to do as to England? You ought, if possible, to secure some of the profits of an edition there. On this subject we must talk . . . ." [18] Sparks' diary for March 6, 1827, notes that after meeting with Justice Washington to discuss their contract he

> passed half an hour with Judge Story. He has taken an ardent interest in this work from the beginning and has assisted me much in bringing the matter to its present issue. He advises by all means to make provision for a sale in England—thinks many will sell and that a vigorous effort should be made to extend the circulation there.[19]

[15] *Id.*, p. 404.

[16] *Id.*, p. 409.

[17] "Articles of Agreement, March 7, 1827", in Manuscript Collection of Morristown, New Jersey, National Historical Park.

[18] H.B. Adams, The Life and Writings of Jared Sparks, v. II, p. 265 (1893).

[19] *Id.*, p. 8. Sparks and Story discussed the editing of the papers on January 20, 1827. *Id.*, p. 3.

To promote advance orders for the forthcoming compilation, Justice Story and Sparks cooperated in a series of letters from Sparks to Justice Story which described the project and were used to obtain press coverage of the letters. The letters appeared in the summer of 1827 in the nation's leading newspapers, including the front page of the *National Intelligencer*,[20] owned by the Supreme Court printer, and caused Justice Story "unmixed satisfaction." [21]

Justice Story's relationship with Sparks and Folsom did not end with the publication of Washington's papers. In 1829 Story became a part-time professor of law at Harvard, where he continued his close friendship with Sparks, who also served on the faculty, and presumably remained in contact with Folsom, who was Harvard's printer.[22] Story, Sparks and Folsom still held these positions in 1841 when Justice Story decided *Folsom* v. *Marsh*. The decision in that case was based on a factual record developed by one George Hillard as Master in Chancery; Hillard was a paid contributor at the time to a series edited by Sparks, the *Library of American Biography*.[23]

Under these circumstances the Court should not attribute to *Folsom* v. *Marsh* the precedential significance that would

[20] The letters are set out in *id.*, pp. 236-264. After their publication Justice Washington wrote to Sparks "Your letters to Mr. Justice Story have excited but one sentiment everywhere so far as I can understand, and that, the most favorable to your undertaking." *Id.*, p. 266. The letters were later reprinted in a pamphlet which was used as a prospectus. *Id.*, p. 236.

[21] *Id.*, p. 265.

[22] See A. Johnson and D. Malone, Dictionary of American Biography, v. III, p. 493, v. IX, pp. 106, 431-33 (1930).

[23] G. Hillard, Captain John Smith (c. 1840). Hillard was a contributor to the North American Review edited by Sparks, as was Story. A. Johnson and D. Malone, Dictionary of American Biography, v. V, p. 50 (1930); H.B. Adams, Life and Works of Jared Sparks, v. I, p. 311 (1893).

be due the decision of a judge who, unlike Justice Story, was not an active instigator and proponent of the work whose copyright was challenged, was not a personal friend of all the parties in interest on one side, and did not have extensive personal knowledge of and participation in the events giving rise to publication.

Since the ownership asserted by appellant is not acquired in any of the manners, such as purchase or bequest, known to the common law, there seems no intelligible limit on what he owns or could acquire as President. Appellant asserts his property includes everything in the White House Office, regardless of what it is or how it got there,[24] and appears unwilling to accept ownership limited to documents he wrote, documents he signed, documents he read, documents he knew existed, documents prepared in the White House, or documents involving privileged material. Sustaining such an assertion would be an invitation to a President to direct that documents be transferred to the White House Office in order to convert them into his personal property. Even were the scope of ownership more restricted, a President could direct government employees to create documents and other materials for his personal use and ultimate removal from the White House. The former Special Prosecutor has suggested that the tapes in this case were made for just such personal gain by appellant.[25] Members of Congress have upon occasion copyrighted materials, or charged fees for giving speeches, written by congressional employees on office time.

The principle of ownership asserted by appellant is not limited to former Presidents. Appellant earlier claimed similar ownership of his Vice Presidential papers, and here

[24] Brief for Appellant, pp. 25-31.

[25] L. Jaworski, The Right and The Power, p. 272 (1976).

suggests officially prepared documents are also the personal property of congressmen and members of this Court.[26] Recently government documents have been removed for personal use, presumably under a similar claim, by White House aides and cabinet and sub-cabinet officials.[27] In earlier years similar assertions of ownership of officially prepared papers or their contents have been made, generally unsuccessfully, by a Vice-Admiral,[28] a Senator,[29] a court reporter of written decisions,[30] a sailor who traveled with Commodore Perry to Japan,[31] and an assistant to the Secretary of the Interior.[32] Recognition of such claims would seriously impair the completeness and integrity of government files, and would ultimately embroil the courts in disputes as to whether, for example, a memorandum is "owned" by the author, the intended recipient, other readers, the person or persons discussed, or any of the supervisors of these individuals.

The public interest requires that a former President or other departing officials not be free to remove at will files kept in or for their offices. The history of this intermittent practice reveals the extent to which it can impede the operations of the national government. Among the documents which thus disappeared with the outgoing officials,

[26] Report of the Joint Committee on Internal Revenue Taxation, Examination of President Nixon's Tax Returns for 1969-72, p. 1 (1974); Brief for Appellant, p. 92.

[27] Brief of Appellees The Reporters Committee for Freedom of the Press, p. 38, n. 30.

[28] *Public Affairs Associates* v. *Rickover*, 369 U.S. 111 (1962).

[29] *Pearson* v. *Dodd*, 410 F.2d 701, 708 (D.C. Cir.) *cert. denied* 395 U.S. 947 (1969).

[30] *Wheaton* v. *Peters*, 8 Peck. (33 U.S.) 591, 660 (1834).

[31] *Heine* v. *Appleton*, 11 F.Cas. 1031 (C.C.D.N.Y. 1857).

[32] *Sawyer* v. *Crowell*, 46 F.Supp. 471 (S.D.N.Y. 1942), aff'd 142 F.2d 497 (2d Cir. 1944).

and whose absence led to serious problems, were the official copy of the Treaty of Versailles,[33] the sole copy of a State Department cable regarding assurances to France during the 1956 Suez Crisis,[34] and the only copy of a memorandum from Secretary of State Dulles assuring the Israelis of aid if the Egyptians blockaded the straits of Tiran.[35] American officials only learned of the latter document when it was relied on by the Israeli Foreign Minister during negotiations with President Johnson on the eve of the 1967 Arab-Israeli war. Even where incumbent officials know documents exist, their predecessors are not always willing to supply them; thus appellant refused to permit examination of any relevant presidential papers by President Ford's Commission on CIA Activities within the United States.[36] These problems are inevitable because, once they leave office, the concerns of former Presidents and other former officials are not solely, or primarily, the effective conduct of government affairs by their successors, but foreseeably and not improperly include protecting their standing in history and advancing the political and financial interests of themselves and their party.

[33] R. Murray, "How Harding Saved The Versailles Treaty", American Heritage, pp. 66-67 (December, 1968).

[34] "Governing in the Dark", Washington Star, January 16, 1977.

[35] *Id.*

[36] Report of the Commission on CIA Activities Within the United States, p. 172 (1975).

II.

The Presidential Recordings and Materials Preservation Act Is Constitutional.

The government's ownership of the materials conveyed to the Administrator by the challenged statute is, we believe, dispositive of the other issues raised by appellant. Such ownership necessarily carries with it the right of officials of the executive branch to hold, examine, and use the government property in question, and appellant could have no privilege exercisable against the lawful owners of the disputed papers and tapes. To the extent that an incumbent President concludes that public disclosure of these or any other documents is consistent with or required in the national interest, his decision cannot be reviewed or countermanded by any of his predecessors. Appellant, having co-mingled his own property, personal and political, with that of the government cannot reasonably object if responsible government officials, at the behest of Congress, seek to examine the resulting admixture to extract what is public property. The Presidential Recordings and Materials Preservation Act does not single out appellant's property, alone among all Presidential papers, for expropriation; the property interest appellant asserts was neither his nor that of his predecessors or successors. To the extent that the Act guarantees appellant access to and copies of all the disputed papers it confers upon him legal rights which he did not previously enjoy.

That documents produced or received by officials in the executive or, for that matter, legislative or judicial branches, are not their personal property does not mean that the custody and secrecy of such materials cannot be controlled, or that public access must be granted prema-

turely. What is at issue is not whether access or use of such materials can be regulated, but who is empowered to regulate it. Since the papers are the property of the United States, they are and must remain under the control of authorized officials of the United States.

Absent a statutory limitation, an incumbent President could place some government documents in the temporary and revocable custody of appellant or any other private citizen, but in the instant case President Carter has not chosen to do so and Congress has prohibited such a transfer.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted,

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